Supreme Court, U.S.
FILED
99 338 AUG 24 1999
No. ____
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IN THE
Supreme Court of the United States

JOHN BURTON and FELIX BURTON,
Petitioners,

v.

NICOLAS CHARLES, CHARITE ASSEIGNE,
MIGUEL AUBOUT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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August 24, 1999

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QUESTIONS PRESENTED

John and Felix Burton retained the services of a farm labor contractor to provide workers to harvest their snap bean crop. While being transported to the Burton Farm, the truck in which the workers were riding, overturned, killing three and seriously injuring numerous other workers. Applying the relevant factors in considering whether the Burtons were joint employers under the Migrant and Seasonal Agricultural Workers Protection Act (hereinafter "AWPA"), the District Court held that the Burtons were not joint employers so as to impose liability under the AWPA. Applying the 1997 revised code of regulations, the court of appeals reversed, deciding that the Burtons were joint employers and, therefore, liable for the injured workers' actual damages.

Question 1:

Whether the revised code of federal regulations under the AWPA, as applied by the court of appeals, imposes a strict liability standard on farmers who utilize farm labor contractors to obtain workers, contrary to Congressional intent.

Question 2:

Whether a farmer who fails to verify that a farm labor contractor possesses a valid certificate of registration is strictly liable for violation of the AWPA provisions which are only applicable to agricultural employers for actual damages that may be sustained by the workers.

LIST OF PARTIES

The parties to the consolidated proceedings below were Petitioners, John and Felix Burton, and Bobby Hall, Jr. and Little Rock Produce Company, Inc., as Defendants. Nicolas Charles, Charite Asseigne, Miguel Aubout, Samson Germain, Marcel Jean-Baptiste, Alexandre Joseph, Marcel Joseph, Edner Philippe, Fito Pierre, Frankel Pierre, Fatami "Rita" Saint Fleur, Gerard Simeon, Lavius Dit Servius Vil and Jean Jacques Vytelle, Individually, and Avelie Maissoneuve, as Personal Representative for the Estate of Jean J. Maissoneuve, Deceased, are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 169 F.3d 1322 (11th Cir. 1999).[1] The district court's opinion finding that the Burtons were not the joint employers of the workers (Pet. App. 2a) is reported at 857 F. Supp. 1574 (M.D. Ga. 1994). The district court's opinion holding that the Burtons were not liable to the workers for actual damages based on the Burtons' failure to verify the farm labor contractor's certificate of registration (Pet. App. 3a) is unreported. The district court's opinion assessing statutory damages against the Burtons based on their failure to verify the certificate of registration of the farm labor contractor (Pet. App. 4a) is unreported.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1985). The opinion and judgment of the court of appeals was entered on March 12, 1999. As required by 28 U.S.C. § 2101(c) (1985) and Rule 20.4, Supreme Court Rules, this petition has been filed within ninety (90) days of the denial of rehearing entered by the Eleventh Circuit on May 26, 1999 (Pet. App. 5a).

STATUTORY PROVISIONS

The Agricultural Workers Protection Act (hereinafter "AWPA") was enacted in 1983, that placed affirmative duties on agricultural employers to assure protections for migrant and seasonal agricultural workers in, among others, the safe transportation of workers to and from the work site. 29 U.S.C. § 1841(b) (Pet. App. 61a-62a). The AWPA defines an agricultural employer as one who owns or operates "a farm, ranch, processing establish-

[1] "Pet. App." references are to the appendix to this petition.

ment, cannery, fin, packing shed or nursery . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal worker." 29 U.S.C. § 1802(2) (Pet. App. 61a).

While affirmative duties to ensure safe housing, safe transportation, and wage and payroll records are placed on "agricultural employers" under the AWPA, 29 U.S.C. § 1842 requires any person who utilizes the services of a farm labor contractor to verify that the farm labor contractor has a valid certificate of registration (Pet. App. 62a). In its discretion, the district court may award actual or statutory damages for violations of the AWPA. 29 U.S.C. § 1854 (Pet. App. 62a).

STATEMENT OF THE CASE

The court of appeals, applying the revised code of federal regulations adopted in 1997 to the facts of this case, overturned the district court's determination that the Burtons were not the joint employers of the workers (Pet. App. 25a). In so holding, the court of appeals decided contrary to its own prior rulings in similar cases (as succinctly pointed out in Senior Circuit Judge Roney's dissenting opinion), which have decided the "joint employer" issue. The court of appeals' analysis of the joint employer issue, in light of the revised regulations, imposes a standard of strict liability on farmers who utilize the services of a farm labor contractor to obtain workers to harvest their crop, which is in direct contravention of Congressional intent. Additionally, contrary to the ruling of the district court, the court of appeals decided that a farmer who fails to verify the certificate of registration of the farm labor contractor is liable for actual damages sustained by the workers, notwithstanding the fact that the farmer is not an "agricultural employer" within the meaning of AWPA (Pet. App. 25a). The ruling runs contrary to Congressional intent in enacting the AWPA

that only "agricultural employers" be liable for actual damages for a breach of the duties imposed on agricultural employers by the AWPA.

The Burtons' Farming Operation

John and Felix Burton are the owners and operators of a 200-acre farm outside the small town of Barney in southwest Georgia. The Burtons are row crop farmers principally growing cotton, corn, soybeans and peanuts. In 1990, the Burtons decided to plant green beans and cucumbers in addition to their main crops (Pet. App. 2a, 33a-34a). The Burtons contacted the Georgia Department of Labor to secure workers to harvest their bean crop. The Department of Labor put the Burtons in contact with Wilner Luxama, a farm labor contractor, who provided the Burtons with a crew to harvest the 1990 crops. Because the harvest took place too late in the season, the beans were unmarketable and Luxama's crew only worked one-half day harvesting beans (Pet. App. 3a, 34a).

The following year, Luxama and a crew of workers returned to the Burton farm to harvest the 1991 bean crop (Pet. App. 3a, 34a). During each day of the harvest, Luxama and members of his crew would transport the workers from their temporary housing in Ashburn, Georgia to the Burtons' farm. Upon arriving at the farm, the Burtons would inform Luxama which field was ready to be harvested (Pet. App. 3a, 34a).[2] Luxama and his crew would then go to the bean field where Luxama would assign duties to specific workers and direct and supervise the details of the harvest. Although not involved in the

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[2] In the production of snap beans, fields are planted approximately a week apart so that the beans will not ripen at the same time and can be harvested while still marketable. Each field is harvested in the order in which it was planted (R6-104-34, 40-41, 62, 64, 67, 131).

direct supervision of the harvest, the Burtons occasionally checked on the progress of the harvest (Pet. App. 3a, 34a-35a).

The Burtons compensated Luxama by paying a negotiated price for each box of beans harvested. Each crewmember would receive a ticket for each box of beans picked. Luxama would pay each worker a set price for each ticket (Pet. App. 3a, 35a). The boxes of beans would then be loaded onto trailers and transported to the packing shed for sale (Pet. App. 3a-4a, 35a). A broker at the packing shed would examine the beans and determine if the beans were marketable. If the beans had grown too large to be marketable, the Burtons were informed and the workers would be told to stop picking the field (Pet. App. 35a).

The Accident

Although the Burtons failed to make a profit on their 1990 and 1991 bean crops, the Burtons again grew snap beans in 1992. Luxama brought a crew to the Burtons' farm to harvest the 1992 crop. On June 3, 1992, the pick-up truck in which the workers were being transported from Ashburn overturned killing three and seriously injuring numerous other workers (Pet. App. 4a, 5a, 36a).[3]

The District Court's Rulings

On March 2, 1994, the district court conducted an evidentiary hearing to determine if the provisions of the AWPA were applicable to the named defendants (Pet. App. 33a). After consideration of the record, the text of the AWPA, the legislative history and federal regulations, the district court held that the Burtons, as well as

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[3] A station wagon that was being used to transport the workers to the Burton farm had broken down and was in a service garage for repair. The pick-up truck in which the workers were riding on the day of the accident had been loaned to Luxama by a mechanic at the service garage (R2-94-11, 38).

the other defendants, were not "agricultural employers" within the meaning of the AWPA, and, therefore, not liable under the motor vehicle safety provisions of the AWPA for the plaintiffs' injuries which resulted from the motor vehicle accident (Pet. App. 48a).

Considering the factors outlined in *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973) as well as additional factors deemed relevant to a joint-employer analysis as outlined in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), the district court determined that the Burtons, although directing which fields were ready to harvest, "maintained no control over the manner in which the beans were picked" (Pet. App. 43a-44a). The district court rejected the plaintiffs' argument that the Burtons maintained a significant degree of control over the workers in making decisions regarding planting, irrigation and cultivation of the crops. Recognizing the realities of agricultural employment, the district court held that evidence of control "must mean something more than simply a restatement of the farmer's role in agriculture" (Pet. App. 42a-43a). As the court noted, a farmer "will almost always be responsible for decisions concerning the planting, irrigating, cultivation, application of pesticides and herbicides and the sale and marketing of the crops" (Pet. App. 43a). Adopting a definition of control espoused in *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984), the district court held that the nature and degree of control over the workers is not evidenced by the farmer's decisions in the production, cultivation and sale of the crops but whether the farmer retains "the right to dictate the manner in which the details of the harvesting function are executed" (Pet. App. 43a).

The district court's rejection of plaintiffs' argument that the nature and degree of control over the workers is shown by the farmers' decisions regarding the planting,

irrigating and cultivating of the crops was in accord with the recent Eleventh Circuit Court opinion in *Aimable v. Long & Scott Farms,* 20 F.3d at 434, which held:

> Although at first glance, the . . . factor may appear to encompass abstract notions of control . . . . We believe that Long & Scott's agricultural decisions—decisions which only indirectly affected the number of workers necessary to harvest the land—can not be likened to "control" in the FLSA/MSAWPA sense . . . . It is not surprising that Long & Scott would (and, despite FLSA/MSAWPA, should be able to) give general instruction to Miller as to which crops to harvest at a particular time . . . . Control arises . . . when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work. *Aimable v. Long & Scott Farms,* 20 F.3d at 440-441.

The district court further determined from the record that while the Burtons periodically checked on the progress of the harvest, Luxama was primarily responsible for supervising the workers. Again citing the decision of *Aimable v. Long & Scott Farms,* the district court determined that the Burtons' "infrequent assertions of minimal oversight . . . do not rise to the level of supervision necessary" to support a finding of a joint employer relationship (Pet. App. 44a).

In considering the other relevant factors in the joint employment analysis, the district court determined that the Burtons did not have the power to determine pay rates or the method of payment of the workers, did not have the right to hire or fire the workers or modify their employment conditions, or have any responsibility for the payment of the workers' wages or the preparation of payroll (Pet. App. 44a-46a). The district court did find two

factors that supported a finding of joint employment, which included that the Burtons owned the property upon which the harvest was conducted, and that the workers performed a specialty job integral to the production of the Burtons' snap bean crop (Pet. App. 47a).

After analyzing the factors relevant to the joint employment issue, the district court concluded that the Burtons did not "employ" the plaintiffs within the meaning of the AWPA and the FLSA. After reviewing the record and the testimony, the district court found:

> . . . that the Burtons retained no direct control over the work of the harvesters, exercised only cursory supervision over the harvest, did not determine the workers' pay rate or the method of payment, did not have the authority to hire or fire the individual crew members, could not modify the employment conditions of the individual workers, did not pay the workers, and were not responsible for the preparation of a payroll (Pet. App. 47a).

The district court declined the plaintiffs' invitation to "look beyond the significance of any particular factor" and hold that because the workers were ultimately economically dependent on the farmers who grew the crops, a joint employment relationship should be found (Pet. App. 47a). In reviewing the legislative history of the AWPA, the district court recognized "that there will be situations in which a farmer is not held to be the joint employer of a farm labor contractor's employees." In rejecting the "economic reality" test advanced by the plaintiffs, the court stated: "an economic reality test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality" (Pet. App. 48a).

After the district court held that the Burtons were not the joint employer of the workers, the Burtons filed a motion for summary judgment on plaintiffs' remaining

claim under the AWPA based on the Burtons' failure to verify that Luxama possessed a valid certificate of registration as required under 29 U.S.C. § 1842. The Burtons contended that actual damages for the plaintiffs' injuries were not recoverable but only statutory damages could be assessed for this technical violation. Construing the term actual damages synonymously with general damages, the district court concluded that the Burtons' failure to check Luxama's certificate of registration "is simply too far removed from the type of harm complained of for actual damages to be attributable to" the Burtons (Pet. App. 55a). In support of its conclusion that the Burtons were not liable to the plaintiffs for actual damages, the court found that the AWPA "clearly provides the court with the discretion to choose between imposition of actual and statutory damages" and that the legislative history did not adopt a strict liability standard to achieve its purposes (Pet. App. 55a). The district court held that statutory damages of up to $500.00 per plaintiff may be awarded (Pet. App. 56a).

On plaintiffs' motion for summary judgment to assess statutory damages against the Burtons for their violation of 29 U.S.C. § 1842, the district court found that, while the Burtons' violation of 29 U.S.C. § 1842 was technically intentional, the Burtons had not been guilty of any prior similar violations. The district court also determined that it was not unreasonable for the Burtons to assume that Luxama was qualified to provide a crew because Luxama had been referred to them by the State Department of Labor. Finding that the violation of 29 U.S.C. § 1842 was "not a knowing, willful and flagrant disregard of the law", the court, in exercising its discretion, awarded each plaintiff the sum of $350.00 as statutory damages (Pet. App. 57a-58a).

The 1997 US Department of Labor Revisions to the AWPA Regulations

Subsequent to the decisions of the district court, the Department of Labor (hereinafter "DOL") issued a final rule revising its regulations to the AWPA on March 12, 1997 (hereinafter the "Rule"). 29 C.F.R. § 500(h) (1997). The new Rule, which purports to provide new guidance in the analysis of whether a farm labor contractor is an independent contractor or a joint employer with the producer, identifies six factors for the courts to consider in the determination of the joint employer issue. 29 C.F.R. § 500.20(h)(4) (1997). For a determination to be made that a joint employer relationship does not exist, the Rule requires a "complete disassociation" between two or more persons with respect to the employment of a particular employee. 29 C.F.R. § 500.20(h)(5)(iii) (1997).

Prior to its adoption, the Rule met with stringent opposition from various groups including Agricultural Producers, American Farm Bureau Federation, California Grape and Tree Fruit League, Florida Fruit and Vegetable Association, Hood River Grower-Shipper Association, Maine Farm Bureau Association, Michigan Farm Bureau, Midwest Food Producers Association, National Cotton Ginners' Association, New England Apple Council, Nisei Farmers League, Pennsylvania Farm Bureau, United States Sugar Corporation, Venture County Agricultural Association, Virginia Farm Bureau Federation, Washington State Growers Clearing House Association, and the National Council of Agricultural Employers. These organizations and associations asserted that the new Rule would impose a strict liability joint employment standard for farmers and producers who utilize the services of a farm labor contractor to obtain labor to harvest their crops. 62 Fed. Reg. 11,734, 11,737 (1997). Despite this

strong opposition to the proposed Rule, the final Rule became effective on April 11, 1997.

The Court of Appeals Reversal

According significant weight to Department of Labor's 1997 revisions to the AWPA regulations, the Eleventh Circuit reversed the district court's determination that the Burtons did not "employ" the plaintiffs within the meaning of the AWPA (Pet. App. 21a). The court of appeals did not take issue with the district court's factual determinations but substituted its own analysis of the joint employer issue. This analysis included consideration of factors that had previously been deemed irrelevant by the courts when determining whether the farmer is a joint employer with the farm labor contractor prior to the adoption of the new Rule.

In analyzing whether the Burtons had the power to direct, control or supervise the workers, the court of appeals found, as did the district court, that the Burtons did not "tell Luxama when to commence picking each day and did not determine whether a specific worker should be disciplined" (Pet. App. 12a). The court of appeals also agreed with the district court that most of the direct supervision and oversight of the harvest was entrusted to Luxama (Pet. App. 13a). The court of appeals determined from the record, as did the district court, that the Burtons would monitor the progress of the harvest several times a day (Pet. App. 13a). However, in holding that the Burtons "exercised some aspects of control", the court of appeals relied on the facts that the Burtons "determined the particular fields they wanted the appellants to cultivate, determined when the appellants would begin picking each field and supplied appellants with boxes that Little Rock provided" (Pet. App. 12a). The court of appeals' reliance on the Burtons' agricultural decisions in the planting, harvesting, and

marketing of the bean crop to evidence control was in direct contradiction to the court's earlier decisions in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) and *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996). To evidence the control factor to support a finding of joint employment, these prior Eleventh Circuit decisions required "specific indicia of control" rather than a mere restatement of the farmer's role in agriculture. Additionally, although recognizing that most of the direct supervision and oversight over the harvesting of the bean crop was entrusted to Luxama, the court of appeals held that the Burtons' monitoring the progress of the harvest was sufficient to show supervision of the workers to evidence a joint employment relationship (Pet. App. 13a). In so ruling, the court of appeals again departed from its decisions in *Aimable* and *Antenor*, which specifically authorized the Burtons to monitor the progress of the harvest without being considered the joint employer of the workers. *Aimable v. Long & Scott Farms*, 20 F.3d at 441-442; *Antenor v. D & S Farms*, 88 F.3d at 935.

The court of appeals agreed with the district court that the Burtons did not have control over Luxama's hiring decisions and that the Burtons did not exercise direct or indirect power to determine the workers' pay rates or the methods of payments, finding that Luxama controlled the rates of pay, how the workers received their pay and when they would be paid. (Pet. App. 14a-15a). However, in concluding that the Burtons had the power to modify the employment conditions or determine the pay rates of the workers, the court of appeals again relied on the Burtons' decisions regarding when the workers would begin picking the snap bean crop, which field would be picked and for how long (Pet. App. 15a). In finding evidence of control in the Burtons' decisions when to plant their snap bean crop, which field was ready

to be harvested and whether to stop the harvest because the beans had become unmarketable, the court of appeals was in direct contradiction to its prior rulings in *Aimable* and *Antenor* which held that a farmer's agricultural decisions in the production of his crop are not proper considerations in the joint employer analysis. *Aimable v. Long & Scott Farms,* 20 F.3d at 441; *Antenor v. D & S Farms,* 88 F.3d at 933.

The court of appeals also agreed with the district court's findings that the workers performed a line-job integral to the production of the Burtons' snap bean crop and that the work performed was on property owned by the Burtons, factors weighing in favor of a joint employment relationship (Pet. App. 18a-19a). The court of appeals then considered other factors contained in the new Rule, which the district court, and the decisions in *Aimable* and *Antenor,* considered irrelevant to the inquiry of whether the Burtons were the joint employers of the plaintiffs. These factors included the degree of permanency and duration of the relationship between the Burtons and the workers, which the court determined did not support a determination that the plaintiffs were economically dependent on the Burtons; that the work performed was a rote, unskilled task, which the court determined weighed in favor of the plaintiffs; and whether the Burtons undertook responsibilities in relation to the plaintiffs commonly performed by the employers, which the court found did not support a finding of economic dependence on the part of the plaintiffs (Pet. App. 15a-17a; 19a-20a).

By applying the new Rule and the Burtons' agricultural decisions in the planting, cultivating, marketing, and monitoring the progress of the snap bean harvest, the court of appeals found that the plaintiffs were economically dependant on the Burtons and, therefore, the Burtons

were joint employers of the workers and liable under the motor vehicle safety provisions contained in U.S.C. § 1841 (Pet. App. 61a-62a).

The court of appeals also reversed the district court's holding that the Burtons' failure to verify that Luxama possessed a valid certificate of registration could not be considered as the legal and proximate cause of the motor vehicle accident and plaintiffs' resulting injuries (Pet. App. 23a). The court of appeals' holding imposes strict liability on any person who utilizes the services of a farm labor contractor for violations of the provisions of the AWPA applicable only to agricultural employers, agricultural associations and farm labor contractors even though they are not agricultural employers within the meaning of the AWPA. This holding is contrary to Congressional intent that only agricultural employers, agricultural associations and farm labor contractors be held responsible for a breach of the duties imposed under the motor vehicle safety provisions of the AWPA. This ruling also removes the discretion of the trial court to assess statutory damages in lieu of actual damages in the event of unintentional and technical violations, contrary to the express terms of the AWPA.

Thus, the Eleventh Circuit concluded as a matter of law that the Burtons employed the plaintiffs within the meaning of the AWPA and were strictly liable to the plaintiffs for failing to verify Luxama's certificate of registration. The court of appeals remanded the case to the district court to consider only the issue of damages for the Burtons' failure to ensure that the vehicles transporting the plaintiffs carried insurance or a liability bond and damages for the Burtons' failure to verify Luxama's certificate of registration (Pet. App. 25a).

REASONS FOR GRANTING THE WRIT

I. THE 1997 REVISED CODE OF FEDERAL REGULATIONS UNDER THE AWPA, AS APPLIED BY THE ELEVENTH CIRCUIT, CREATES A STRICT LIABILITY STANDARD ON FARMERS WHO UTILIZE THE SERVICES OF A FARM LABOR CONTRACTOR IN DIRECT DEROGATION TO CONGRESSIONAL INTENT.

In enacting the AWPA, Congress intended to make its provisions applicable to agricultural employers through a joint employment analysis. However, Congress recognized that there would be situations in which a farmer would not be held as the joint employer of the farm labor contractor's employees. See H.R. Rep. No. 885, 97th Cong., 2d Sess. at 7; reprinted in 1982 U.S.C.C.A.N. 4547; *Charles v. Burton*, 857 F. Supp. 1574, 1581 (M.D. Ga. 1994). Recognizing the variety of employment relationships in the agricultural economy, Congress "believed that in some situations, holding a producer jointly liable would be unfair." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkley J. Employment & Lab. L. 175, 180 (1998). However, in adopting the revised regulations in 1997 to create a broader standard to encourage enforcement of the AWPA, "the Rule effectively treats a producer as a farm labor contractor's joint employer *in all cases*." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkley J. Employment & Lab. L. at 180. (Emphasis supplied.)

The legislative history of the AWPA evinces that, in adopting the new Rule, the Department of Labor has gone far beyond what Congress intended in advancing the joint employer doctrine under the AWPA. Specifically addressing the appropriate analysis to be used in deciding whether a farmer is a joint employer with the farm labor contractor where the farmer/producer asserts that the workers were the sole employees of the farm labor contractor, the Committee of Education and Labor stated, "it is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (1973) be controlling." H.R. Rep. No. 97-885, 97th Cong., 2nd Sess. at 7 (1982); reprinted in 1982 U.S.C.C.A.N. 4547. The Fifth Circuit in *Hodgson* announced five factors to be considered in an analysis of the joint employer issue; (1) whether the work is performed on the premises of the company; (2) how much control does the company exert over the employees; (3) does the company have the power to fire, hire, or modify the employment condition of the employees; (4) do the employees perform a specialty job within the production line; and (5) may the employee refuse to work for the company or work for others. *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d at 237-238.

Based upon the congressional mandate that the analysis set forth in *Hodgson v. Griffin and Brand of McAllen, Inc., supra*, be utilized in the joint employer determination, the Department of Labor adopted five regulations to guide the courts in a determination of the joint employer issue:

A. The nature and degree of control of the workers;

B. The degree of supervision, direct or indirect, of the work;

C. The power to determine the pay rates or the methods of payment of the workers;

D. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

E. Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii) (1983).

From a reading of *Hodgson v. Griffin and Brand of McAllen, Inc.*, and the initial regulations adopted by the DOL, it is clear that Congress only intended that a joint employer relationship be found when the farmer or grower takes an overly active role in controlling the details of the harvesting process, in supervising and overseeing the harvest, dictating the pay rate or the power to modify other conditions of employment of the workers. However, the DOL, in adopting the new Rule, has transcended congressional intent that, in some cases, a joint employer relationship should not be found. The DOL's new Rule has effectively fashioned a regulatory scheme where a joint employment relationship will be found in all cases.

To demonstrate how the DOL's new Rule creates a strict liability standard on farmers, the factors which were identified by the court of appeals as relevant to the joint employer determination under the new Rule, and the evidentiary basis applied by the court, is examined below.

A. Whether the Farmer Has the Power to Direct, Control or Supervise the Workers.

In analyzing this factor, the court of appeals agreed with the district court that the Burtons did not tell Luxama when to begin picking each day and did not determine whether a specific worker should be disciplined (Pet. App. 12a). In deciding that the Burtons exhibited *some aspects* of control, the court of appeals relied on the facts that the Burtons determined which field to harvest, when to begin picking each field and supplied the workers with

boxes (Pet. App.. 12a). Since it is only the farmer who knows which field was planted first and ready for harvest, the farmer must always direct the farm labor contractor to the appropriate field. Therefore, by holding that control is shown when a farmer directs the farm labor contractor to the field which is ready to harvest, the court of appeals' decision will result in this factor always weighing in favor of a finding of joint employment.

The second aspect of this factor the court of appeals analyzed was the degree of supervision over the workers. Although recognizing that the Burtons entrusted most of the direct supervision and oversight of the workers to Luxama, the court of appeals found that, because the Burtons instructed Luxama what fields to harvest and monitored the progress of the harvest several times per day, these facts were sufficient to find that the supervision factor weighed in favor of a joint employer relationship (Pet. App. 13a). As stated in the preceding paragraph, the farmer must tell the farm labor contractor what part of the crop is ready for harvest since he is the one who planted the crop. Additionally, it is inconceivable that a farmer will not periodically check on the progress of the harvest since his very livelihood is dependent on the crops he grows and getting them to market. By deciding that supervision is shown by directing the farm labor contractor to the field which is ready to be harvested and periodically checking on the progress of the harvest, the court of appeals' decision will result in this factor always weighing in favor of a finding of a joint employer relationship.

B. Whether the Farmer Has the Power to Hire, Fire, Modify Employment Conditions, Determine Pay Rates or the Method of Payment.

In analyzing this factor, the court of appeals agreed with the district court that Luxama controlled the workers'

pay rates, how they received payment and when they were paid (Pet. App. 14a). The court of appeals also found that the Burtons did not control Luxama's hiring decisions and did not modify the workers' employment conditions such as the number of hours the workers harvested (Pet. App. 15a). However, the court of appeals held that this factor weighed in favor of finding a joint employer relationship because the Burtons "ultimately decided when the workers would begin harvesting the snap bean crop, which fields to harvest and for how long" (Pet. App. 15a). How these facts indicate the Burtons' power to hire, fire, modify employment conditions or determine pay rates and methods of payment is unknown to this writer, but if such circumstances are used to support a finding of joint employment, this factor will always weigh against the farmer. When the workers begin the harvest is determined by when the farmer plants his seeds. Which field is ready to harvest is dependent on which field was planted first. Whether an entire field of snap beans is harvested is dependent on whether the remaining beans are of a size to be marketable. Every farmer must make these agricultural decisions of what time of year to plant his seeds, what part of his crop is ready to harvest and when to cease the harvest when the remaining crop cannot be sold. By utilizing these agricultural decisions (which must be made by every farmer) to evidence a farmer's power to hire, fire, modify employment conditions or determine pay rates or methods of payment, this factor will always weigh in favor of a finding of joint employment.

C. The Degree of Permanency and Duration of the Relationship Between the Parties.

The court of appeals considered this factor despite it not being included as part of the analysis in *Hodgson v. Griffin and Brand of McAllen, Inc.*, as well as this factor being determined irrelevant in the joint employer

analysis in *Aimable v. Long & Scott Farms* and *Anterior v. D & S Farms.* However, finding that the evidence of record did not establish that plaintiffs worked for the Burtons in years prior to 1992, the court of appeals held that this factor weighed against a finding of a joint employment relationship (Pet. App. 15a).

D. Whether the Services Performed Are a Repetitive, Rote, Unskilled Task.

Following the Eleventh Circuit's prior decision in *Aimable v. Long & Scott Farms,* the district court did not consider this factor in its analysis of the joint employment issue (Pet. App. 40a). In *Aimable,* the Eleventh Circuit determined that this factor, (which was not a regulatory factor under the old DOL Rule), was not relevant since it would only indicate that the workers were employees, but not helpful in determining if they were employees of the farm labor contractor, the farmer or both. *Aimable v. Long & Scott Farms,* 20 F.3d at 444. Similarly, citing the case of *Hodgson v. Griffin and Brand of McAllen, Inc.,* as Congress' expressed intent of the proper criteria in making joint employment determinations, the Eleventh Circuit in *Antenor v. D & S Farms* refused to consider this factor in its analysis of the joint employment issue. *Antenor v. D & S Farms,* 88 F.3d at 931-932. However, the court of appeals in this case chose "to analyze this factor, since it is included in the AWPA's regulations" adopted in 1997 (Pet. App. 17a). As would be expected in all cases involving migrant and seasonal workers, the court of appeals found that picking snap beans is a rote, unskilled task, requiring little training and weighed this factor in favor of finding a joint employer relationship. In utilizing this factor in its analysis, which is included in the DOL's new Rule, the court of appeals considered criteria which are in direct derogation of Congress' intent that the analysis in *Hodgson* be utilized as the appropriate approach in the joint employment determination.

Again, when this factor is utilized in a joint employment analysis under the AWPA, this factor will always weigh against the farmer and in favor of a finding of a joint employment relationship.

E. Whether the Workers' Activities Are an Integral Part of the Farmer's Operation.

Finding that the work performed by the plaintiffs was integral to the Burtons' production and harvesting of their bean crop, the court of appeals determined that this factor weighed in favor of a joint employer relationship (Pet. App. 18a). In the context of the production and harvesting of vegetables, migrant and seasonal workers' picking of the crop will always be integral to the business of the production of the crop. Therefore, this factor will always weigh in favor of a joint employer relationship.

F. Whether the Work Is Performed on the Farmer's Premises.

Finding that the Burtons owned the land upon which the plaintiffs picked the snap bean crop, the court of appeals found that this factor weighed in favor of finding a joint employer relationship (Pet. App. 19a). It is difficult to imagine a circumstance in which migrant or seasonal workers are not harvesting crops on lands that are either owned or leased by the farmer. Again, this factor will always weigh in favor of a joint employer determination.

G. Whether the Farmer Undertook Responsibility Employers Commonly Perform.

The court of appeals recognized that the Burtons did not undertake any responsibilities or perform any functions in relation to the plaintiffs that are commonly performed by employers finding this factor weighing against a determination of a joint employer relationship (Pet. App. 19a-20a).

Utilizing the analysis in *Hodgson v. Griffin and Brand of McAllen, Inc.*, as mandated by Congress in enacting the AWPA and the initial regulations adopted by the DOL, the district court correctly concluded that the Burtons were not the joint employer of the plaintiffs. However, as the forgoing demonstrates, the court of appeals' utilization of the DOL's new Rule will dictate a determination of a joint employer relationship in every case. Under the new Rule, once a farmer sows his seed, his status as a joint employer with the farm labor contractor is preordained. A farmer will always make decisions on when to plant, cultivate and irrigate. The farmer will always make the decision as to the proper time to harvest his crops. A farmer will always check on the progress of the harvest since his very livelihood is dependent on getting his crops to market in a salable condition. A farmer will always decide what part of the crop is ready to be harvested and when to stop the harvest of a field because the crop has become unmarketable. The work of the migrant and seasonal worker will always be found to be a rote, unskilled task, requiring little or no training and the work will always be performed on lands either owned or leased by the farmer. These factors will also always weigh against the farmer and in favor of a joint employer determination. While the incidental factors of the permanency and duration of the relationship and whether the farmer undertakes responsibilities commonly performed by employers may weigh against a finding of joint employment in some cases, these two factors, standing alone, will never overcome the predetermined factors against the farmer under the new DOL Rule.

The district court recognized that to utilize an "economic reality" test as advanced by the plaintiffs would create a strict liability standard by stating, "An economic reality test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality" (Pet. App. 48a). In

his law review article finding that the new DOL Rules creates a strict liability standard on farmers, Professor Michael H. LeRoy, of the Institute of Labor and Industrial Relations and College of Law, University of Illinois, noted that the economic reality test, which was advanced by the plaintiffs in this case, was identical to the test advanced under the new DOL Rule. Ironically, writing after the district court's decision and the adoption of the new DOL rule, but prior to the court of appeals' decision in this case, Professor LeRoy stated:

> The same case (*Charles v. Burton*) would have had an opposite result if it had been tried under the new Rule. The broad "economic reality" test advanced by the migrant workers in *Burton* is identical to the Rule's test. On *Burton's* facts, however, it would be manifestly unjust to hold the farmers liable for a car accident they could not have prevented. Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis,* 19 Berkley J. Employment & Lab. L. at 213.

Professor LeRoy determined that the new Rule, as applied in *Burton*, loses the flexibility the courts have brought to the cases under the AWPA, flexibility that Congress intended when it enacted the AWPA. Despite the strong opposition and valid concerns voiced by the opponents of the new Rule, "the DOL did not craft the Rule to accommodate the perceived problems. *It retained a strict liability standard* while maintaining it was not doing so, apparently because it believed the federal courts would not enforce the MSPA (AWPA) properly without it." Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Analysis,* 19 Berkley J. Employment & Lab. L. at 195, 213. (Emphasis supplied).

Based upon the foregoing, it is clear that the new DOL Rule, as applied by the court of appeals in this case, creates a strict liability standard on farmers who utilize the services of a farm labor contractor in that a joint employer determination will be made in all cases. The legislative history of the AWPA provides the appropriate analysis to be applied in the joint employer determination and it is clear that Congress did not intend that a joint employer relationship be found in every case. The new DOL Rule and the court of appeal's decision in this case are in derogation of congressional intent. Based upon the foregoing, this Court must define the correct analysis to be utilized in the joint employment determination which is consistent with Congress' intent in enacting the AWPA.

II. THE COURT OF APPEALS' DECISION IS IN CONTRAVENTION OF OTHER PANEL DECISIONS OF THE ELEVENTH CIRCUIT IN *AIMABLE v. LONG & SCOTT FARMS* AND *ANTENOR v. D & S FARMS.*

The court of appeals concluded that the Burtons exercised some degree of control over the plaintiffs by determining the particular fields ready to harvest, and by supplying the plaintiffs with boxes. Considering the farmer's decisions in the production of his crops to evidence control constitutes a drastic departure from the Eleventh Circuit's previous decisions in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), and *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) which limited the inquiry of control to specific indicia of control. This conflict between these decisions was succinctly brought to light in Senior Circuit Judge Roney's dissenting opinion (Pet. App. 26a). Both the *Aimable* and *Antenor* courts recognized that agricultural decisions regarding which crops to plant, how much to plant, how to grow the crop, which parcels of land to harvest, when in the season to begin the harvest, and how frequently the

field should be harvested cannot be likened to "control" in the AWPA sense. The *Aimable* court found it unsurprising that the grower would give general instructions to the farm labor contractor as to which crops to harvest at a particular time and such instructions do not evidence control within the meaning of the AWPA. To find control sufficient to evidence a joint employer relationship, the *Aimable* court stated: "Control arises, we believe, when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work." *Aimable v. Long & Scott Farms*, 20 F.3d at 441. Following the decision in *Aimable v. Long & Scott Farms,* the Eleventh Circuit in *Antenor v. D & S Farms* also required specific indicia of control to support a finding of a joint employer relationship, holding that abstract notions of control arising out of general agricultural decisions of the farmer insufficient. In *Antenor,* the Eleventh Circuit stated: "Such control arises when a grower determines . . . the number of workers hired for a job, when work should begin on a particular day, which workers should be assigned to particular tasks, and whether a worker should be disciplined or retained." *Antenor v. D & S Farms*, 88 F.3d at 933.

In this case, the court of appeals found no specific indicia of control by the Burtons but used their agricultural decisions in determining which field was ready to harvest and directing Luxama to the appropriate field to evidence control over the workers. Therefore, as Judge Roney noted in his dissent, the court of appeals' decisions in this case is in direct contravention to the Eleventh Circuit's prior rulings in *Aimable* and *Antenor* (Pet. App. 28a).

The court of appeals' holding that the Burtons' monitoring the progress of the harvest is sufficient to support a

finding of supervision over the workers is also in contravention of the Eleventh Circuit's prior decisions in *Aimable* and *Antenor*. As Justice Roney wrote in his dissenting opinion, while the Burtons directed Luxama to the appropriate field for harvesting, "the Burtons did not direct the work of the harvest or supervise the plaintiffs in the field. Monitoring the harvest several times a day is akin to the 'infrequent assertions of minimal oversight' discussed in *Aimable*" (Pet. App. 29a). In *Aimable*, there was evidence that the employers, on occasion, provided direction to the pickers and occasionally gave the farm labor contractor demands that were relayed to the workers. *Aimable v. Long & Scott Farms*, 20 F.3d at 441, 442. In this case, the Burtons did not direct, even occasionally, the work of the plaintiffs, directly or through the farm labor contractor, Wilner Luxama. The regular monitoring of the progress of the harvest by the Burtons is less than the degree of supervision the Eleventh Circuit in *Aimable* held to be insufficient to demonstrate a degree of supervision to show joint employer status. The court of appeals' decision in this case is in direct contravention to the holding in *Aimable*. Even the new DOL Rule recognizes the necessity of a reasonable degree of oversight to ensure compliance of the contract by the farm labor contractor. 29 C.F.R. § 500.20(h)(5)(iv)(A) (1997).[4] Therefore, not only is the holding by the court of appeals in this case in direct conflict with the holding in *Aimable v. Long & Scott Farms*, it is in direct conflict with the Code of Federal Regulations.

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[4] 29 C.F.R. § 500.20(h)(5)(iv)(A) (1997) provides; whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties.)

The court of appeals' considerations in determining the Burtons' power to hire, fire, modify the employment conditions, pay rate or methods of payment also conflicts with and contravenes the Eleventh Circuit's decision in *Aimable v. Long & Scott Farms.* As Justice Roney pointed out in his dissenting opinion, the relevant considerations regarding an analysis of this factor is who controlled the pay rates, determined how the workers received their pay and when payment was made (Pet. App. 29a). In its majority opinion, the court of appeals acknowledged that the Burtons "did not determine whether a specific worker should be disciplined . . . did not enjoy a 'veto' power over Luxama's hiring decisions . . . In fact, Luxama controlled their pay rates, determined how they received their pay and when they received payment" (Pet. App. 12a, 14a, 15a). These factual findings by the court of appeals would demand a determination that the Burtons did not have the power, either directly or indirectly, to hire, fire, modify the employment conditions or determine the pay rates or the method of wage payment for the plaintiffs. As in its analysis of the other factors discussed above, the court of appeals' decision in this case cannot be reconciled with the decisions in *Aimable v. Long & Scott Farms* and *Antenor v. D & S Farms.*

The court of appeals refused an en banc rehearing to reconcile the obvious conflicts in its decision in this case and its previous rulings in *Aimable* and *Antenor.* The conflict between these Eleventh Circuit decisions prohibit a consistent analysis of the joint employer determination and creates great uncertainty within the regulated community concerning what are the appropriate considerations in the joint employer analysis. This Court should reconcile these conflicts and give guidance to the lower courts and the regulated community as to the appropriate factual considerations in the joint employer determination.

III. THE ELEVENTH CIRCUIT'S DECISION IMPOSES STRICT LIABILITY ON PERSONS WHO FAIL TO VERIFY THE CERTIFICATE OF REGISTRATION OF A FARM LABOR CONTRACTOR FOR BREACH OF DUTIES IMPOSED BY THE AWPA ONLY UPON AGRICULTURAL EMPLOYERS, CONTRARY TO CONGRESSIONAL INTENT.

From a reading of the AWPA and the legislative history, it is evident that Congress intended to place the burden and responsibility of achieving the goals of the legislation upon agricultural employers and agricultural associations directly involved in the working conditions, payment, housing and transportation of migrant and seasonal workers. In the area of transportation safety, Congress specifically places the burden upon agricultural employers and agricultural associations to ensure that the vehicles transporting migrant and seasonal workers comply with federal and state safety standards and that any vehicle used to transport migrant or seasonal workers is adequately insured. 29 U.S.C. § 1841.

The legislative history surrounding the enactment of the AWPA demonstrates Congress' intent to impose liability for violations of certain provisions of the Act based upon the employer-employee relationship. In discussing the term "employ" the Committee explained that the reason for an expansive definition to include "joint employer" relationships was to place duties upon agricultural employers and agricultural associations and to attach liability for a breach thereof. The Committee stated:

> The Committee's use of this term was deliberate and done with the clear intent of adopting the "joint employer" doctrine as a central foundation of this new statute; it is the indivisible hinge *between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties. The determination of whether a farm labor contractor, agricultural employer or agricul-*

> *tural association has certain duties under this act will turn on whether such person is an employer of migrant or seasonal agricultural workers.* H.R. Rep. No. 885, 97th Cong., 2nd Sess. (1982); reprinted in 1982 U.S.C.C.A.N. 4547, 4552. (Emphasis added).

In this case, the plaintiffs seek to impose the liabilities of an agricultural employer on the Burtons through a violation of 29 U.S.C. § 1842, a non-agricultural employer statute. However, it is clear that Congress did not intend to impose the liabilities attendant with an employer's breach of duty imposed by 29 U.S.C. § 1841 to a non-employer through a violation of 29 U.S.C. § 1842. Congress did not intend to impose strict liability upon "any person" who utilizes the services of a farm labor contractor for a violation of the motor vehicle safety provision found in 29 U.S.C. § 1841, and the court of appeals' ruling runs contrary to the Congressional statutory scheme. Not being the employers of the workers, the Burtons did not have the duties imposed under 29 U.S.C. § 1841 and, therefore, cannot be held liable in damages for a breach of those duties. The ruling of the district court is consistent with the legislative intent that only those persons who are employers of farmworkers be held liable for actual damages arising out of the breach of duties imposed on agricultural employers by the AWPA.

The district court also determined that the Burtons' failure to check Luxama's certificate of registration was "simply too far removed from the type of harm complained of for actual damages to be attributable to defendants." Citing *Ricketts v. Vann*, 861 F. Supp. 404, 406 (E.D. N.C. 1993) *aff'd on other grounds*, 32 F.3d 71 (4th Cir. 1994), the district court held that to recover actual damages the plaintiff must show that a particular violation of the AWPA was the proximate cause of the damages suffered (R4-130-3). The court determined that nothing in the legislative history of the AWPA suggested that a rule of strict liability be imposed to achieve the

purposes of the Act and that by the use of the term "actual" damages Congress intended that there be a causal requirement between a particular violation and the type and measure of damages recoverable (R4-130-4).

The district court's ruling is an accurate application of the law in the state of Georgia to the facts of this case. The governing statute in Georgia as to when damages are recoverable is O.C.G.A. § 51-12-9 that states:

> Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequences, are too remote and contingent to be recovered.

In the case sub judice, while the Burtons' failure to verify that Luxama possessed a valid certificate of registration may be traceable to Plaintiffs' damages, the lack of insurance to cover medical care and lost wages are not the legal and natural consequences of the act. It cannot be said that a person of ordinary caution and prudence could reasonably have foreseen that a failure to verify a certificate of registration would result in an unfortunate accident while the workers were on their way to fields or that the farm labor contractor would have not have carried the necessary insurance on the vehicle. It is notable that no court has authorized the recovery of actual damages for a violation of 29 U.S.C. § 1842 and have determined that such a violation is not egregious, is only a technical violation and have awarded less than the maximum amount of $500.00 as statutory damages. See *Saintida v. Tyre*, 783 F. Supp. 1368, 1375 (S.D. Fla. 1992) (violation of 29 U.S.C. § 1842 is not egregious and does not warrant maximum statutory award, $100.00 as to each plaintiff); *Frenel v. Freezeland Orchard Company, Inc.*, 108 Lab. Cas. P 35,016 (E.D. Va. 1987) (award of $100.00 per plaintiff).

Further 29 U.S.C. § 1854(c) gives discretion to the trial court to award actual or statutory damages. In this case, while the court found the Burtons' violation was technically intentional, "the violations were not a knowing, willful and flagrant disregard of the law" and that it was reasonable for the Burtons to assume that Luxama was a qualified farm labor contractor since Luxama had been referred to the Burtons by the State Department of Labor (R4-159). To hold that the Burtons are liable for Plaintiffs' actual damages as a matter of law, disregards Congress' intent that the district courts have discretion to determine an appropriate award of damages in each case based upon the nature of the violation. To allow actual damages to be assessed in some cases for a violation of 29 U.S.C. § 1842 and the assessment of statutory damages in other cases, would "create anomalous results Congress could not have intended" and which would not be necessary "to accomplish Congress' general purpose to encourage effective enforcement". *Alvarez v. Longboy*, 697 F.2d 1333, 1339 (9th Cir. 1983).

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully submit this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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August 24, 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-9212

D.C. Docket Nos. 7:92-CV-150-HL;
6:95-CV-00053;
7:95-CV-00092

NICOLAS CHARLES; CHARITE ASSEIGNE, *et al.*,
Plaintiffs, Counter-Defendants,
Appellants, Cross-Appellees,

versus

JOHN BURTON, FELIX BURTON, *et al.*,
Defendants, Counter-Claimants,
Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

(March 12, 1999)

Before HATCHETT, Chief Judge, RONEY and CLARK,
Senior Circuit Judges.

PER CURIAM:

The entire panel concurs in Parts I, II, and Part IV which discusses whether the appellees "utilized" Wilner Luxama's services, and Part V which holds that appellees John and Felix Burton may be held liable for actual damages for their failure to verify Luxama's registration under 29 U.S.C. § 1842. Judge Roney dissents from Part III, which holds that the Burtons were joint employers and therefore statutorily required to carry insurance or a liability bond.

In this case involving the Agricultural Workers Protection Act, 29 U.S.C. § 1801-1872 (1994) (AWPA), fifteen migrant farm workers challenge the district court's grant of summary judgment in favor of the appellees John Burton, Felix Burton, Little Rock Produce Company and Bobby Hall. The district court found that the appellees were not joint employers of the farm workers under the AWPA and did not award the farm workers actual damages for a violation of the AWPA's registration provision. We affirm in part, reverse in part and remand.

I. BACKGROUND

John Burton and Felix Burton (collectively, the Burtons) operated a farm in Brooks County, Georgia. The Burtons principally grew cotton, corn, soy beans and peanuts on their farm. In 1990, the Burtons decided to grow other vegetables—snap beans and cucumbers—and contracted with Little Rock Produce Company (Little Rock), a produce packinghouse, and its president and principal stockholder, Bobby Hall, to subsidize these new crops and to advance money for labor costs. Both were to share in the profits. Little Rock also agreed to supply the seeds for the snap bean and cucumber crops, boxes for the harvest and a trailer to transport the beans, and

the Burtons in turn agreed to market these crops through Little Rock.

Pursuant to the contract, Little Rock required the Burtons to fertilize the snap bean crop and to obtain labor for its harvest. In 1990, the Burtons contacted the Georgia Department of Labor to obtain workers for the snap bean crops, and Paul Emil Paul and Wilner Luxama, farm labor contractors (FLC), agreed to supply them with workers for the snap bean harvest. The Burtons eventually agreed to pay Luxama a set amount of money per box of snap beans that his crew picked, and Luxama paid each worker a set amount per box.[1] The 1990 harvest occurred too late in the snap bean season, and consequently, Luxama's workers spent a total of one-half of a day working on the Burtons' farm that year.

The next year, Luxama and his crew returned to the Burtons' farm to harvest the 1991 snap bean crop. Luxama transported the 25 to 35 members of his Florida-based crew between the Burtons' farm and their temporary housing in Ashburn, Georgia.[2] The Burtons would direct Luxama to a particular snap bean field, and his crew picked all of the field's beans. Luxama directed and supervised the harvest of the snap beans, and the Burtons observed the progress of the workers approximately two to three times a day. As they picked the snap beans, the workers placed them in the boxes that Little Rock pro-

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[1] According to Luxama's deposition testimony, the Burtons agreed to pay him between $3.75 and $4 per box. Luxama in turn paid his workers $2.50 per box for the first picking, and then $3 per box for the second and additional pickings. Luxama provided his workers a ticket for each box they picked, and then paid them for each ticket the worker returned to him.

[2] Luxama recruited his workers (Haitian immigrants) from Miami to pick crops, including snap beans, in Georgia. He also helped the workers find housing when they arrived in Georgia, although the crew paid for all of its housing expenses.

vided. At the end of the day, Luxama weighed all of the boxes of snap beans, and a crew member placed the boxes onto a trailer that Little Rock owned. The Burtons then transported the snap beans to Little Rock's packinghouse, where a broker selected and sold them.

The Burtons failed to earn a substantial profit from the 1991 snap bean crop, but they decided to plant and harvest them for the next year.[3] In 1992, Luxama returned with his crew to harvest the crop. Luxama's registration as a farm labor contractor with the Department of Labor (as the AWPA requires) has lapsed in 1991 because he had failed to pay a fine that the Department of Labor had imposed. *See* 29 U.S.C. § 1811. As a result of this lapse and his inability to pay the fine, Luxama failed to purchase liability insurance for the vehicles used to transport his crew as the AWPA requires. *See* 29 U.S.C. § 1841.[4] The Burtons failed to check Luxama's certification as an FLC, and failed to learn that Luxama no longer carried the required insurance. *See* 29 U.S.C. §§ 1841(b) (duty to carry insurance of liability bond), 1842 (duty to check registration). On the morning of June 3, 1992, one of Luxama's trucks overturned while transporting the work-

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[3] Since the 1991 crop failed to make a profit, the Burtons did not reimburse Little Rock's advancements for their labor costs.

[4] Section 1841(b) of the AWPA provides:

> (1) When using, or causing to be used, any vehicle for providing transportation . . . each agricultural employer, agricultural association, and farm labor contractor shall . . .
>
> (C) have an insurance policy or a liability bond that is in effect which insures the agricultural employer, the agricultural association, or the farm labor contractor against liability for damages to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker.

See 29 U.S.C. 1841(b)(1)(C).

ers to the fields, killing the driver and two workers and seriously injuring others.[5]

In December 1992, the appellants sued John Burton, Felix Burton, Little Rock and Hall for violations of the AWPA, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* and Georgia's common law of negligence. The appellants alleged, in part, that the appellees violated the "registration, vehicle safety, vehicle insurance, record keeping, wage statement and wage payment provisions of the AWPA," and the appellees moved for summary judgment. After conducting an evidentiary hearing, the district court held that the appellees did not "employ" the workers within the meaning of the AWPA and the FLSA, and granted the appellees summary judgment. *See Charles v. Burton*, 857 F. Supp. 1574, 1583 (M.D. Ga. 1994). This conclusion precluded the appellants from recovering any damages for the appellees' failure to ensure that Luxama's truck carried either insurance or a liability bond. *See* 29 U.S.C. § 1841(b)(1)(C).

Thereafter, the appellees moved for summary judgment on the remaining claims, with (1) Little Rock and Hall arguing that they had not "utilized" the services of Luxama pursuant to the 29 U.S.C. § 1842; and (2) the Burtons alleging that although they had utilized Luxama's services and violated the registration verification provisions under 29 U.S.C. § 1842, the workers were entitled only to statutory damages under 29 U.S.C. § 1854(c)(1). The district court granted Little Rock's and Hall's mo-

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[5] The accident killed appellant Jean J. Maissoneuve (Avelie Maissoneuve appears as the personal representative of his estate), rendered appellant Edner Phillipe a paraplegic, and caused various injuries to appellants Nicolas Charles, Charite Asseigne, Miguel Aubout, Samson Germain, Marcel Jean-Baptiste, Alexandre Joseph, Marcel Joseph, Fito Pierre, Frankel Pierre, Fatami Saint Fleur, Gerard Simeon, Lavius Dit Servius Vil and Jean Jacques Vytelle. We shall refer to these workers collectively as the appellants.

tions for summary judgment, finding that they had not "utilized" the services of Luxama and his crew. *See Charles v. Burton*, No. 92-150-VAL (M.D. Ga. Mar. 7, 1995).[6] The district court later found the Burtons liable for $350 in statutory damages per worker for the violation of section 1842, but refused to award actual damages because the workers' injuries were "too far removed" from the Burtons' failure to verify Luxama's registration. *See Charles v. Burton*, No. 7:92-cv-150 (M.D. Ga. Sept. 8, 1995) (granting summary judgment); *Charles v. Burton*, No. 92-150-VAL (M.D. Ga. July 26, 1996) (awarding statutory damages).[7]

II. ISSUES

The issues we discuss are: (1) whether the district court erred in finding that the appellees were not "joint employers" of the appellants, and were thus not liable under section 1841 of the AWPA (Part III); (2) whether

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[6] Appellee Bobby Hall died in October 1995, and the district court treated the appellants' motion for substitution of party as a motion to substitute Bobby Hall, Jr. (the administrator of Bobby Hall's estate) as a defendant, and granted the appellants' motion. *See* Charles v. Burton, No. 7:92-cv-150 (M.D. Ga. July 30, 1996). Appellee Hall contends that the district court erred in substituting him pursuant to Federal Rules of Civil Procedure 25(a). We find that the district court did not abuse its discretion in substituting Bobby Hall, Jr., as a defendant after the appellants timely filed a motion for substitution pursuant to Rule 25(a) . *See* Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1357-58 (11th Cir. 1994) (interpreting Federal Rule of Civil Procedure 25(c)).

[7] In August 1995 the appellants also filed diversity lawsuits alleging common law negligence claims against Little Rock and the Burtons. The district court consolidated those claims with the AWPA and FLSA claims and granted summary judgment in favor of Little Rock and the Burtons on the common law negligence claims. *See* Charles v. Burton, No. 7:92-150 (M.D. Ga. Nov. 30, 1995) (consolidating); Charles v. Burton, No. 7:92-cv-150 (M.D. Ga. Aug. 20, 1996) (granting summary judgment).

the district court erred in finding that appellees Little Rock and Hall did not "utilize" the services of the appellants under section 1842 of the AWPA (Part IV); and (3) whether the district court erred in failing to award the appellants actual damages for the Burtons' violation of that provision (Part V).[8]

III. JOINT EMPLOYMENT

In 1983, Congress enacted the AWPA "to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers." 29 U.S.C. § 1801. Included in the AWPA are requirements (1) that an FLC obtain a certificate from the Secretary of Labor authorizing it to perform its duties, *see* 29 U.S.C. § 1811(a); 29 C.F.R. § 550.40 (1997); (2) that a person utilizing the services of an FLC verify the existence of such certificate, *see* 29 U.S.C. § 1842; and (3) that an FLC and an agricultural employer carry either an insurance policy or liability bond covering any vehicle used to transport agricultural workers, *see* 29 U.S.C. § 1841; 29 C.F.R. 500.120.

The appellees contend, and the district court agreed, that they did not "employ" the appellants, that they were not "agricultural employers" or "joint employers" within the meaning of the AWPA and that the AWPA did not require them to carry insurance or a liability bond under

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[8] The appellants raise for the first time the issue of whether the appellees formed a partnership or joint venture under Georgia law. This court, however, will not consider on appeal issues not raised before the district court. *See* Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994).

section 1841.[9] *See Charles*, 857 F. Supp. at 1583. The definition of "employ" is the same under the AWPA and the FLSA. *See* 29 U.S.C. § 203(1); 29 U.S.C. § 1802(2). An entity "employs" a person under the AWPA and the FLSA if it "suffers or permits" the individual to work. *See* 29 U.S.C. § 203(g); 29 C.F.R. § 500.20(h)(1). "An entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity." *Antenor v. D&S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 34 (1961)).

The AWPA's concept of "employ" also includes "the *joint employment* principles applicable under the [FLSA]." *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir.), *cert. denied*, 513 U.S. 943 (1994); 29 C.F.R. § 500.20(h)(5).[10] According to the AWPA regulations,

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[9] The AWPA defines "agricultural employer" as "any person who owns or operates a farm, ranch, processing establishment, cannery, fin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2). The AWPA defines "migrant agricultural worker" as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A).

[10] In 1997, the Department of Labor amended the AWPA regulations, attempting to remedy the misconceptions surrounding the definition of "joint employment." This clarification of joint employment focuses more closely on the "economic dependence" test that federal courts had previously established. *See* Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. 11734, 11745-46 (1997) (codified at 29 C.F.R. pt. 500 (1997)). This court accords significant weight to the statutory interpretation of the executive agency charged with implementing the statute being construed, particularly when that interpretation is incorporated in a formally published opinion. *See* Chevron, U.S.A., Inc. v. Natural

> joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in a particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.

29 C.F.R. § 500.20(h)(5). The issue in joint employment cases "is not whether the worker is more economically dependent on the independent contractor or grower, with the winner avoiding responsibility as an employer." *Antenor*, 88 F.3d at 932. Instead, the AWPA "envisions situations where a single employee may have the necessary employment relationship with not only one employer but simultaneously such a relationship with an employer and an independent contractor." *Antenor*, 88 F.3d at 932 (quoting H.R. Rep. No. 97-885, 97th Cong., 2d Sess. (1982) 7, 1982 U.S.C.C.A.N. 4547, 4553).

This court, and the AWPA regulations, have considered the following regulatory factors as guidance in determining economic dependence, and ultimately, whether an employment relationship exists: (1) whether the agricultural employer has the power, either alone or through the FLC, to direct, control or supervise the workers or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties); (2) whether the agricultural employer has the power, either alone or in addition to another employer, directly or in-

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Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1507 (11th Cir. 1993).

directly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the workers; (3) the degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue; (4) the extent to which the services that the workers rendered are repetitive, rote tasks requiring skills that are acquired with relatively little training; (5) whether the activities that the workers performed are an integral part of the overall business operation of the agricultural employer; (6) whether the work is performed on the agricultural employer's premises, rather than on premises that another business entity owns or controls; and (7) whether the agricultural employer undertakes responsibilities in relation to the workers that employers commonly perform, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment). *See* 29 C.F.R. § 500.20(h)(5)(iv)(A)-(G); *see also Antenor*, 88 F.3d at 932; *Aimable*, 20 F.3d at 439.

We will consider all of the enunciated factors as guidance, with "the weight of each factor [depending] on the light it sheds on the farmworkers' economic dependence (or lack thereof) on the alleged employer, which in turn depends on the facts of the case." *Antenor*, 88 F.3d at 932-33 (citing *Aimable*, 20 F.3d at 440). A determination of employment status under the AWPA and the FLSA is a question of law subject to *de novo* review. *See Antenor*, 88 F.3d at 929; *Aimable*, 20 F.3d at 440.

1. Whether the appellees had the power to direct, control or supervise the appellants (directly or indirectly).

Prior to 1997, the AWPA regulations split this factor into two concepts: first, the nature and degree of control over the workers; and second, the degree of supervision over their work. The district court also considered these two concepts separately. As for the nature and degree of control of the appellants, the district court found that "there is absolutely no indication . . . that defendants [Hall] and Little Rock retained the 'right to dictate the manner in which the details of the harvesting function [were] executed.'" *Charles*, 857 F. Supp. at 1580 (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984)). The district court also found that "although defendants John and Felix Burton retained a degree of control over the harvest in that they directed which fields would be picked, they maintained no control over the manner in which the beans were picked. The details of the harvest were left to [Luxama]." *Charles*, 857 F. Supp. at 1580.

In *Aimable*, this court found that the focus of this concept "is more properly limited to specific indicia of control (for example, direct employment decisions such as whom and how many employees to hire, whom to assign to specific tasks, and how to design the employee's management structure)." *Aimable*, 20 F.3d at 440. *Antenor* identified several other indicia of control, including: when work should begin on a particular day; whether a worker should be disciplined; whether the agricultural employers were free to delay or stop the workers directly from continuing their work; and whether the agricultural employers could assign work to specific workers indirectly. *See Antenor*, 88 F.3d at 933-34. The evidence presented demonstrated that while Little Rock supplied boxes to the Burtons to be used for the appellants, neither Hall nor

Little Rock engaged in direct or indirect control over the appellants. *See, e.g., Patel v. Wargo*, 803 F.2d 632, 638 (11th Cir. 1986) (finding that company's president, director and principal stockholder did not take a sufficiently active role to be an "employer" under the FLSA). The Burtons, however, exhibited some control. For example, the Burtons determined the particular fields that they wanted the appellants to cultivate, determined when the appellants would begin picking each field and supplied appellants with boxes that Little Rock provided. They did not, however, tell Luxama when to commence picking each day and did not determine whether a specific worker should be disciplined. *See Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir.) (finding that agricultural worker exercised sufficient control in determining when the workers were to commence harvesting each day to be an "employer" under the AWPA), *cert. denied*, 414 U.S. 819 (1973). Therefore, although we agree with the district court that this aspect of the first factor weighs against finding that the appellants were economically dependent on Hall and Little Rock, we find that the Burtons exercised some aspects of control that weigh in favor of finding that the appellants were economically dependent on the Burtons.

The second aspect of this factor concerns the degree of direct or indirect supervision that the agricultural employer enjoyed over the workers. The necessary supervision under this factor "includes overseeing the pickers' work and providing direction," while keeping in mind "special aspects of agricultural employment." *Antenor*, 88 F.3d at 934-35. In an agricultural setting, "the grower is not expected to look over the shoulder of each farmworker every hour of every day. Thus, it is well settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the con-

tractor." *Antenor*, 88 F.3d at 935 (quotations and citations omitted). "Infrequent assertions of minimal oversight," however, fail to satisfy the supervision necessary under this factor. *See Aimable*, 20 F.3d at 441.

The workers alleged, and the record reveals, that the Burtons directed Luxama to tell the appellants to harvest certain areas of their farm and monitored their harvesting several times per day.[11] The Burtons, however, entrusted most of the direct supervision and oversight over the appellants in Luxama. We believe that the Burtons' supervision overcomes *Aimable*'s "infrequent assertions of minimal oversight" and instead resembles *Antenor*'s definition of indirect control. The workers, however, have not presented any evidence that Little Rock or Hall directly or indirectly supervised their work in any fashion. We therefore find that this first factor favors a conclusion that the appellants were economically dependent on the Burtons, based on their indirect control and supervision. We also find that this factor weighs against such a conclusion as for Little Rock and Hall.

2. Whether the appellees had the direct or indirect power to hire, fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the appellants.

The district court also considered aspects of this factor separately. First, the appellants argued that the appellees ultimately shared responsibility for their wages, because the appellees controlled the amount of seeds planted and

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[11] Appellant Asseigne observed the Burtons near their worksite often, and noticed that they talked to Luxama. *See* Asseigne Dep. at 31. Appellant Aubout stated that he observed the Burtons talking to Luxama, and, since most of the appellants did not speak English, Luxama then instructed the appellants in their native language what the Burtons needed. *See* Aubout Dep. at 17-18.

fields harvested and paid Luxama a specific price for each box of beans harvested, and that Luxama then paid the appellants a set price for each box that they individually harvested. The appellees rely on *Rutherford Food Corp. v. McComb*, where the Supreme Court found the operator of a slaughterhouse exerted indirect influence over the pay rates for the boners when he controlled the number of cattle slaughtered and boned. 331 U.S. 722, 730 (1947). The district court found that *Aimable* precluded the reliance on *McComb*, finding this "leap of logic"—since the appellees controlled the amount of money Luxama received, and since Luxama controlled the amount the appellants received, that the appellees therefore controlled the amount the appellants received—to be unfounded. *See Aimable*, 20 F.3d at 442 ("Unfortunately for appellants, the laws that bind the Euclidian world do not apply with equal force in federal employment law."); *Charles*, 857 F. Supp. at 1580. The appellants presented no other convincing evidence to show that the appellees exercised direct or indirect power to determine their pay rates or the methods of payments. In fact, Luxama controlled their pay rates, determined how they received their pay and when they received payment.

The appellants also argue that the Burtons, on behalf of their enterprise with Hall and Little Rock, delegated the task of assembling a picking crew to Luxama and therefore indirectly enjoyed the rights to hire, fire or modify the employment conditions of the appellants. In *Antenor*, this court found that evidence showing that the agricultural employers "dictated the workers' hours, a condition of employment, by deciding when the work was to begin . . . [and] forcing the pickers to stop picking when prices were bad[,]" indicated that they enjoyed these rights. *See Antenor*, 88 F.3d at 935. The Burtons planted and fertilized the snap bean crop and directed

Luxama to have the appellants harvest it on certain dates. While the Burtons did not enjoy a "veto" power over Luxama's hiring decisions and did not modify such employment conditions as the picker's daily hours, they decided ultimately when the appellants would begin picking their snap bean crop, where they would pick it and for how long. Thus, elements of this factor weigh in favor of the appellants being economically dependent on the Burtons. Again, though, the appellants present no evidence that either Hall or Little Rock directly or indirectly enjoyed this power.

3. The degree of permanency and duration of the relationship of the parties.

The district court did not consider this factor, following *Aimable*'s holding that this factor is irrelevant in analyzing joint employment. *See Aimable*, 20 F.3d at 443-44; *Chales*, 857 F. Supp. at 1579. The *Aimable* court found that this factor helped determine whether the FLC, as opposed to any other putative agricultural employer, employed the farm workers. *See Aimable*, 20 F.3d at 444. We note that the *Aimable* court nonetheless analyzed this factor, and, given its inclusion in the AWPA's regulations, feel that its analysis should provide this court guidance in determining "the economic reality of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer." 29 C.F.R. 500.20(h)(5)(iv)(C); *Antenor*, 88 F.3d at 933.[12]

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[12] The Department of Labor additionally commented on this issue, stating that, despite *Aimable*,

> the great weight of the case law supports consideration of the degree of permanency and exclusivity in the relationship between the workers and the putative employer in the context of the agricultural operation in question. The duration of that

The appellants allege that they had an ongoing relationship with the appellees because they spent most of their time during the 1992 snap bean harvest season working for them. Additionally, they contend that Luxama's relationship with the appellees was longstanding in that he had provided workers for their snap bean harvests between 1990 and 1992. The appellees allege, pursuant to *Aimable,* that the evidence showed that only Luxama, not the appellees, had the ongoing relationship with the appellants. The appellees also argue that no evidence indicated that the appellants harvested the snap bean crop in 1990 or 1991, and that the evidence showed that some of the appellants may have worked at a different farm during the snap bean harvest, and others may have chosen to stay home on certain days during the harvest.

Other courts have considered this issue and have found that "[h]arvesting of crops is a seasonal industry, without much permanence beyond the harvesting season. However temporary the relationship may be . . . the relationship is permanent . . . [if] the migrants work only for [the] defendants during that season." *Haywood v. Barnes,* 109 F.R.D. 568, 589 (E.D. N.C. 1986) (quoting *Donovan v. Gilmor,* 535 F. Supp. 154, 162 (N.D. Ohio), *appeal dismissed,* 708 F.2d 723 (6th Cir. 1982)). Another court has found that "[o]ne indication of perma-

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> operation necessarily affects the duration or permanency of that relationship. Where an FLC and the workers are engaged for the duration of the operation and are obligated to work only for or be available to the agricultural employer/association at his/her discretion during that period, that information bears directly on the question of the workers' economic dependence. Other courts have found this factor relevant and the Department believes that duration of the relationship should be one of the factors considered in determining joint employment.

Agricultural Workers Protection Act, 62 Fed. Reg. at 11,740 (citations omitted).

nency . . . is the fact that it is not uncommon for the migrant families to return year after year." *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987), *cert denied*, 488 U.S. 898 (1988). Luxama and the appellants harvested snap beans on the Burtons' farm in 1992. While this harvest was seasonal, the Burtons expected Luxama's crew to harvest the entire snap bean crop. Luxama and the appellants also worked for another farm during this snap bean harvest.[13] While Luxama returned between 1990 and 1992 to harvest the Burton's snap bean crop, the appellants presented no evidence to show that all of them picked snap beans for the Burtons during these dates. Therefore, we find that the appellants have failed to meet the permanency and exclusivity factor, and this factor weighs against a determination that the appellants were economically dependent on the appellees.

4. The extent to which the services that the appellants rendered are repetitive, rate tasks requiring skills that are acquired with relatively little training.

The district court also failed to consider this factor in determining that the appellees were not joint employers of the appellants, and the *Aimable* court found that an analysis of this factor fails to aid in this determination. *See Aimable*, 20 F.3d at 444. We, however, choose to analyze this factor, since it is included in the AWPA's regulations.[14] It is unquestionable that the services that

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[13] Luxama stated that at times he would send some of the appellants to pick snap beans at a nearby farm in Tifton, Georgia. Luxama Dep. at 56.

[14] The Department of Labor explained:

> [C]ourts have considered the worker's degree of skill to be a relevant and probative factor in the determination of [economic] dependence. In common experience in the agricultural

the appellants rendered—picking snap beans—is a repetitive and rote task requiring relatively little training. Therefore, we find that this factor weighs in favor of concluding that the appellants were economically dependent on the appellees.

5. Whether the activities that the appellants performed are an integral part of the appellees' overall business operation.

This factor is "probative of joint employment because a worker who performs a routine task that is a normal and integral phase of the grower's production is likely to be dependent on the grower's overall production process." *Antenor*, 88 F.3d at 937. The district court held that this factor favored the appellants, finding that they "performed a line-job integral to the harvesting and production of salable vegetables." *Charles*, 857 F. Supp. at 1581 (quoting *Aimable*, 20 F.3d at 444). While the Burtons contend that their snap bean harvest comprised a small percentage of their overall farming operations, we find that this factor weighs in favor of determining that the appellants were economically dependent on the Burtons, Little Rock and Hall because the appellants' picking of snap beans was integral to both harvesting and producing snap beans—the appellees' business.

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industry and other contexts, there is a reasonable correlation between the worker's degree of skill and the marketability and value of his/her services. In the free market place, an unskilled task may easily be learned and performed by almost any worker is a task for which many workers (both trained and untrained) can realistically compete, and is also a task for which the competing workers would not be able to demand or expect high wages. The lower the worker's skill level, the lower the value and marketability of his/her services, and the greater the likelihood of his/her economic dependence on the person utilizing those services.

Agricultural Worker Protection Act, 62 Fed. Reg. at 11,740-41.

6. Whether the work is performed on the appellees' premises, rather than on premises that another business entity owns or controls.

This factor is probative of joint employment because "without the land, the worker might not have work, and because a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors." *Antenor*, 88 F.3d at 937 (citing *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 513-14 (5th Cir. 1969)). The district court correctly found that the appellants picked snap beans on the Burtons' property, which provides indicia that the Burtons employed the workers. The district court also found, however, that no party presented any evidence that the appellants performed any work on the property of either Little Rock or Hall. Thus, we find that this factor weighs in favor of finding that the appellants were economically dependent on the Burtons, but were not economically dependent on either Little Rock or Hall.

7. Whether the appellees undertook responsibilities in relation to the appellants that employers commonly perform.

The district court did not consider this factor, finding that one of its considerations, "investment in equipment and facilities," to be irrelevant pursuant to *Aimable*. *Aimable*, 20 F.3d at 443; *Charles*, 857 F. Supp. at 1579. Once again, because this factor is enunciated in the AWPA's regulations, and considered in *Antenor*, we consider it as guidance in our determination of "economic dependence" and "joint employment." [15] The evidence,

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[15] The Department of Labor commented:

> Where a putative employer provides materials or services, undertakes functions normally performed by an employer (such

viewed in the light most favorable to appellants, demonstrates that neither Little Rock, Hall nor the Burtons had any responsibility in preparing or making payrolls, paying FICA taxes, or providing workers compensation insurance for the appellants. Little Rock issued checks to Luxama for the number of boxes his crew picked, but these payments were advances to the Burtons for their labor costs. Luxama paid the appellants for the number of boxes they picked and provided housing and transportation for the appellants. Little Rock also provided the Burtons with boxes for the appellants to place the picked snap beans in and provided a trailer for the Burtons to transport the snap beans to Little Rock's packing shed. Although the appellees provided certain materials useful in the appellants' work, which is probative of the appellants' economic dependence on the appellees, the appellees did not undertake any other functions that an employer normally performed. Thus, we find that this factor weighs in favor of determining that the appellants were not economically dependent on the appellees.

In considering all of these factors, we realize that "no one factor is determinative," and that the existence of joint employment "depends on teh economic reality of *all the circumstances.*" *Antenor*, 88 F.3d at 932 (quotations and citations omitted). We note that "the absence of evidence on any one or more of the criteria listed does not preclude a finding that an . . . agricultural employer was

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as providing workers' compensation, paying FICA taxes, transporting or housing workers, providing the tools and equipment necessary to the work), such behavior indicates that it is his/her interest to perform such functions that are commonly performed by employers rather than rely on the FLC. Further, workers who use the services, materials or functions are in a very tangible way economically dependent on the entity performing these functions.

Agricultural Workers Protection Act, 62 Fed. Reg. at 11,741-42.

a joint employer along with the crewleader," *Antenor*, 88 F.3d at 933 (quotations and citations omitted). We also note that since the AWPA is a remedial statute, we must construe it broadly. *See Caro-Galvan*, 993 F.2d at 1505 ("AWPA is a remedial statute and should be construed broadly to effect its humanitarian purpose."). Based on our analysis of the factors, we hold that the appellants were economically dependent on the Burtons, and, as a matter of law, that the Burtons employed the appellants under the AWPA. The Burtons enjoyed a sufficient degree of indirect supervision and control over the appellants, supplied the land and ultimately decided when, where and how long the appellants would harvest their snap bean crop. Further, the appellants performed services that required little training, yet were integral to the Burtons' farming operation. Because we hold that the Burtons employed the appellants, they are liable as joint employers for violations of section 1841 of the AWPA. We also hold that, based on our analysis of these factors, Little Rock and Hall did not employ the appellants within the meaning of the AWPA.[16]

IV. UTILIZATION OF SERVICES

The next issue we discuss is whether the appellees "utilized" Luxama's services. *See* 29 U.S.C. § 1842. According to section 1842, unless a person utilizes the services

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[16] We note the district court's holding that to find the Burtons joint employers under the AWPA, "every farmer who hired a farm labor contractor would become for purposes of the AWPA . . . a joint employer of the contractor's employees." *Charles*, 857 F. Supp. at 1581-82. We disagree, finding that the economic reality of the facts in this case indicate that the Burtons employed the appellants. We caution district courts to analyze each of these enunciated factros as guidance, taking into account the facts of each case, and the economic reality of each situation, to determine whether a farm worker is economically dependent on an agricultural employer.

of a farm labor contractor to supply an agricultural worker, there is no responsibility to be concerned about the farm labor contractor's certificate of registration. *See* 29 U.S.C. § 1842. Even though Little Rock and Hall did not "employ" appellants, they can be liable under section 1842 because it speaks only of a person who utilizes the services of an FLC, not an "employer."

The district court granted Little Rock's and Hall's motions for summary judgment on this issue, finding that neither Little Rock nor Hall "utilized" Luxama's services because the Burtons exercised the discretion to hire Luxama, and exercised subsequent control over Luxama and the appellants. *See Charles v. Burton*, No. 92-150-VAL (M.D. Ga. Mar. 7, 1995).

We find that the district court did not err in granting summary judgment for Hall and Little Rock, based on our analysis of "joint employment" and "economic dependence." The appellants presented no evidence that Little Rock or Hall engaged in directing, controlling or supervising the appellants. Further, Little Rock and Hall did not hire Luxama, but instead delegated the decision of hiring and paying for snap bean labor to the Burtons. Therefore, we agree with the district court that neither Little Rock nor Hall "utilized" the services of Luxama and the appellants. The Burtons however, concede that they utilized Luxama's services. We agree with the district court that the Burtons "utilized" the services of Luxama and the appellants, based on this same analysis.

V. DAMAGES

Having utilized the services of appellees, there was a statutory obligation on the part of John and Felix Burton to "first take[] reasonable steps to determine that the farm labor contractor possesse[d] a certificate of registration which [was] valid and which authorize[d] the activity for

which the contractor [was] utilized." 29 U.S.C. § 1842. The Burtons concede they failed to determine if the farm labor contractor had a valid certificate authorizing him to transport agricultural workers. *See* Burton's Brief in Support of Mot. for Summ. J. at 4 ("The Burtons did not check to see if [Luxama] had a certificate of registration when he came to the Burton's farm with the Haitian crew to pick beans.").

The district court granted the Burtons' motion for summary judgment in part, finding that the AWPA's legislative history failed to adopt a position on strict liability, and finding that the Burtons were not liable for the appellants' actual damages because their failure to check Luxama's certificate of registration was "too far removed from the type of harm complained of' to attribute actual damages to the Burtons. The district court therefore found that it should only award statutory damages of up to $500. *Charles v. Burton*, No. 7:92-cv-150 (M.D. Ga. Sept. 8, 1995). The district court later awarded the appellants $350 in statutory damages, finding the Burtons' violations to be "technically intentional." *See* 29 U.S.C. 1854(c)(1); *Charles v. Burton*, No. 92-150-VAL (M.D. Ga. July 26, 1996).

The district court erred by holding that the Burton's failure to verify Luxama's registration, in violation of 29 U.S.C. § 1842, was too far removed from the appellants' injuries to warrant actual damages under 29 U.S.C. § 1854(c). Appellants do not claim the Burtons are responsible for the accident or their resulting physical injuries. Instead, they claim an inability to obtain medical care and a lack of compensation for lost wages because Luxama had no insurance coverage. Such a lack of access to insurance proceeds in an injury separate and distinguishable from appellants' physical injuries. *See, e.g., Huff v. Standard Life Ins. Co.*, 897 F.2d 1072, 1074

(11th Cir. 1990) ("[T]he very essence of" a cause of action for negligent delay in the processing of an insurance application "is that the insurance company's negligence caused the absence of insurance coverage, which in turn damages the applicant."), *cert. denied*, 499 U.S. 936 (1991); *Michigan Abrasive Co., Inc. v. Poole*, 805 F.2d 1001, 1003, 1005-06 (11th Cir. 1986). This is true even though appellants do not claim that the Burtons' actions caused them to be uninsured, but instead claim that the Burtons' actions precluded them from having access to insurance coverage which another person, in this case Luxama, was required to maintain. *See, e.g., Lippincott v. Exotica Imports, Inc.*, 413 So.2d 66, 67 (Fla. Dist. Ct. App. 1982) (Defendant, an automobile dealer, sold a vehicle to a purchaser who did not have insurance coverage, dealer failed to verify that purchaser had insurance coverage, plaintiff was involved in an automobile accident while a passenger in purchaser's vehicle, plaintiff sued dealer, and court held that dealer "should be responsible to" plaintiff because it "did cause injury to [plaintiff] in that [plaintiff] was without the protection of [insurance] benefits at the time of the accident."). The Burtons' failure to check Luxama's certificate of registration was not far removed from the appellants' inability to obtain medical care and compensation for lost wages at all.

Luxama did not possess a certificate of registration and had no insurance to cover the damages that resulted from plaintiffs' physical injuries. To obtain a certificate of registration, Luxama, like any other farm labor contractor, would have had to produce documentation showing that he had an insurance policy or liability bond which insured "against liability to persons . . . arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker." 29 U.S.C. § 1841(b)(1)(C); *see* 29 U.S.C. § 1812(2).

If the Burtons had utilized a farm labor contractor with a valid certificate of registration, there would have been insurance to cover appellants' physical injuries. *See* 29 U.S.C. §§ 1812(2); 1841(b)(1)(C). This uncontested fact is contrary to the district court's decision that "defendants' failure to check Mr. Luxama's certificate of registration is simply too far removed from the type of harm complained of for actual damages to be attributable to defendants." The Burtons' failure to determine whether Luxama had a valid certificate of registration was a proximate cause of the appellants' damages, not their physical injuries, but the damages that accrued because there was no insurance to cover their medical care and lost wages.

VI. CONCLUSION

Based on the foregoing, we reverse the district court's holding that the Burtons did not employ the appellants, affirm the district court's finding that neither Little Rock nor Hall employed the appellants or utilized their services, and remand this case to the district court to consider damages for the Burtons' failure to ensure that the automobiles transporting the appellants carried insurance or a liability bond, in violation of 29 U.S.C. § 1841, and to consider damages for the Burtons' failure to verify Luxama's certificate of registration before utilizing his services, in violation of 29 U.S.C. § 1842.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

RONEY, Senior Circuit Judge, concurring in part and dissenting in part:

In Part III of this opinion, the Court reverses the summary judgment entered in favor of John and Felix Burton and holds that appellees did "employ" the appellants, that they were "agricultural employers," or "joint employers" within the meaning of the AWPA and that therefore they were statutorily required to carry insurance or a liability bond under section 1841. I respectfully dissent from that portion of the opinion.

The Court correctly identifies the regulatory factors and case law that must guide us in determining whether an employment relationship exists. I believe that application of these factors, however, yields the opposite result.

There are two controlling cases in this circuit involving seasonal and migrant farm workers which apply these several factors and that guide the decision. In *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir.), *cert. denied*, 513 U.S. 943 (1994), this Court held in a suit under both the Fair Labor Standards Act (FLSA) and the Agriculture Workers Protection Act that the "growers," the owners and operators of the farm upon which the laborers worked was not a joint employer with the contractor. In *Antenor v. D&S Farms*, 88 F.3d 925, 929 (11th Cir. 1996), involving a similar suit, we held that the growers and the labor contractor were joint employers. At first glance, it might appear that these two cases conflict. Closer examination of the facts in each of the cases reveals the substantial differences that led to different conclusions.

What this issue boils down to then is whether the defendants are like the non-employer growers in the *Aimable* case, or like the employer growers in the *Antenor* case. I have constructed a chart attached hereto as an appendix

showing the decision as to each regulatory factor made in *Aimable, Antenor*, and by the district court and the panel in this case, and the evidence on each point. This chart clearly shows that the defendants are more like the growers in *Aimable* than like the growers in *Antenor*. A study of the chart will indicate that further discussion in this part of this opinion would be redundant. I would therefore affirm, based upon the evidence revealed in the chart, and the decision of the district court that the Burtons were not joint employers of the plaintiffs in this case and therefore had no duty to carry insurance or a liability bond under section 1841 of the AWPA.

I concur in the other portions of the court's opinion.

RE: NO. 96-9212, CHARLES V. BURTON

APPENDIX
APPLICATION OF THE FACTORS (Column 1)
INDICATING A JOINT EMPLOYMENT RELATIONSHIP

CASES, THEIR HOLDINGS AND ANALYSIS

	Aimable v. Long & Scott Farms, 20 F.3d 434 (11th Cir. 1994) (Tjoflat, Birch, Henderson) Held: Growers were not joint employers.	Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996) (Barkett, Carnes, Dyer) Held: Growers were joint employers.	Charles v. Burton (district court's order) Held: Burtons were not joint employers of plaintiffs.	Per Curiam Opinion Charles v. Burton, No. 96-9212 (Hatchett, Roney, Clark) Held: Burtons were joint employers.	Judge Roney's dissent Held: Burtons were not joint employers.
Nature and degree of control of workers.	Does not support a finding of joint employment. Long & Scott did not control number of workers hired, did not demand that FLC hire or fire specific individuals, and did not select specific workers to do specific jobs. Agricultural decisions like deciding which crops to harvest at a particular time cannot be likened to "control" in AWPA sense.	Supports finding of joint employment. Growers told FLC how many farm workers to bring each day, determined precise moment picking would begin each day, were free to delay or stop workers from continuing their work, and had ability to (and in fact did) assign work to specific workers.	Does not support finding of joint employment. Although Burtons retained a degree of control over harvest in that they directed which fields would be picked, they maintained no control over manner in which beans were picked. Details of harvest were left to Luxama.	Supports finding of joint employment. Burtons determined particular fields plaintiffs should cultivate, when plaintiffs would begin picking each field, and supplied plaintiffs with boxes that Little Rock provided. Burtons did not, however, tell Luxama when to commence picking each day and did not determine whether a specific worker should be disciplined.	Does not support a finding of joint employment. The type of decisions referred to by JWH are agricultural decisions relating to the harvest, not worker management decisions as discussed in Aimable and Antenor. JWH acknowledges Burtons did not make direct worker management decisions such as when the growers would commence picking or when a worker should be disciplined.

Degree of supervision of work.	Does not support a finding of joint employment. Although Long & Scott employees regularly came to the field, they rarely provided direction to plaintiffs' work. While Long & Scott employees occasionally gave FLC commands that were relayed to plaintiffs, Long & Scott generally left supervision and oversight to FLC.	Supports a finding of joint employment. Growers told workers when to begin picking, distributed boxes, and directly oversaw and intervened in pickers' work on daily basis. For example, a supervisor who worked for the growers made sure baskets were full and made sure no trash was in baskets, and growers complained to FLC that job was not going fast enough.	Does not support a finding of joint employment. Burtons maintained extremely limited degree of supervision by checking progress of harvest 2-3 times per day. Luxama was primarily responsible for supervision of workers.	Supports finding of joint employment. Burtons directed Luxama to tell plaintiffs to harvest certain areas of farm and monitored harvesting several times per day. Burtons, however, entrusted most of direct supervision and oversight to Luxama.	Does not support a finding of joint employment. While Burtons directed Luxama to the appropriate fields for harvesting, the Burtons did not direct the work of the harvest or supervise the plaintiffs in the field. Monitoring the harvest several times a day is akin to the "infrequent assertions of minimal oversight" discussed in Aimable.
Power to determine rates and methods of pay.	Does not support a finding of joint employment. FLC alone determined plaintiffs' wages, which workers to pay on piece-rate basis or hourly basis, and when and if to increase wages.	Supports finding of joint employment. Growers' exercise of some control over pickers' pay evidenced by fact that they deducted money for worker's compensation insurance and social security from amount they paid FLC per box picked and gave FLC a separate check for the employer and employees' share of taxes. Growers decided which insurance to buy and named themselves as the policyholders. This limited FLC's freedom to allocate money he received for his services.	Does not support a finding of joint employment. Luxama determined how much, when, and the manner in which plaintiffs were paid. Citing Aimable, court rejected contention that Burtons determined pay because they paid Luxama and plaintiffs' pay necessarily depended on what Luxama was paid.	Does not support a finding of joint employment. Luxama controlled pay rates, determined how plaintiffs received their pay and when they received payment. JWH considered paying social security taxes and providing workers compensation under an additional factor enunciated in the 1997 amendments to the AWPA, "Whether the appellees undertook responsibilities in relation to the appellants that employers commonly perform," concluding that the evidence demonstrated the Burtons had no responsibility in paying, FICA taxes or providing workers compensation insurance for plaintiffs.	Does not support a finding of joint employment. Luxama controlled the rates and method of payment. Does not support a finding of joint employment. Luxama controlled pay rates, determined how plaintiffs received their pay and when they received payment. We consider paying social security taxes and providing workers compensation under an additional factor enunciated in the 1997 amendments to the AWPA, "Whether the appellees undertook responsibilities in relation to the appellants that employers commonly perform," and conclude that the evidence demonstrated the Burtons had no responsibility in paying, FICA taxes or providing workers compensation insurance for plaintiffs.

Right to hire, fire, or modify employment conditions.	Does not support a finding of joint employment. Long & Scott never mandated that a worker be hired or fired, never shifted a worker from one pay classification to another or from one task to another, and never dictated hours a worker was to work.	Supports finding of joint employment. Growers had power to veto FLC's hiring decisions and to modify conditions such as hours pickers worked. For example, the growers monitored pickers' job qualifications instead of relying on FLC to do so when they stopped work until they could verify compliance with new immigration laws. Also, growers dictated pickers' hours by deciding when work would begin, by forcing pickers to stop working when prices were bad, and by once sending other picking crews into fields, causing plaintiffs to run out of work by noon.	Does not support a finding of joint employment. No evidence that Burtons had authority to hire or fire individual workers. Weather, size of beans, size and skill of crew, and acreage all determined amount of time plaintiffs could work. But within the time allowed by these factors, Luxama controlled the number of hours plaintiffs worked, and decided which task each would perform. For example, not every plaintiff actually picked beans -- some collected boxes and distributed tickets.	Supports a finding of joint employment. Burtons planted and fertilized the snap bean crop and directed Luxama to have plaintiffs harvest it on certain dates. Burtons decided ultimately when plaintiffs would begin picking the crop, where they would pick it, and for how long. Burtons, however, did not enjoy "veto" power over Luxama's hiring decisions and did not modify conditions such as plaintiffs' daily hours.	Does not support a finding of joint employment. No evidence that Burtons had power to make hiring or firing decision or to modify conditions such as the hours plaintiffs worked. The fact that the Burtons planted and fertilized the crop and directed Luxama to harvest it on certain dates does exhibit the type of specific power over plaintiffs' employment conditions contemplated in Antenor and Aimable.
Permanency and exclusivity and duration of employ-ment.	Factor irrelevant because it demonstrates only that plaintiffs were employees of FLC, not whether they were also employees of Long & Scott: (1) the fact that FLC worked for Long & Scott for many years has no bearing on whether plaintiffs were employed jointly by Long & Scott, and (2) plaintiffs worked exclusively for FLC during harvest seasons at Long & Scott's farms and other farms.	Did not discuss.	Did not consider, following Aimable's holding that this factor is irrelevant to determine joint employment status.	Factors weighs against finding of joint employment. Plaintiffs (and Luxama) worked for another farm during snap bean harvest. Although Luxama returned to Burtons' farm three years, plaintiffs did not present evidence that they returned all three years. (Despite Aimable's holding that this factor is irrelevant, Judge Hatchett considered this factor because it is listed in the 1997 amendments to AWPA regulations.)	Does not support a finding of joint employment. Plaintiffs (and Luxama) worked for another farm during snap bean harvest. Although Luxama returned to Burtons' farm three years, plaintiffs did not present evidence that they returned all three years. Need to address this factor because it is listed in the 1997 amendments to AWPA regulations.

Degree of skill required to perform the job.	Factor not relevant because it shows only that crop pickers were employees, not who employed them.	Did not discuss.	Did not consider, following Aimable's holding that this factor is irrelevant in analyzing joint employment.	Weighs in favor of finding of "economic dependence." Picking beans is a repetitive, rote task requiring little training. (Despite Aimable's holding that factor irrelevant, Judge Hatchett considered this factor because it is listed in the 1997 amendments to AWPA regulations.)	Irrelevant to this analysis because it supports finding of economic dependence, but does not address issue of joint employment.
Perform-ance of a specialty job integral to business.	Favors finding of joint employment because crop-picking was "a line-job integral to the harvesting and production of salable vegetables."	Favors finding of joint employment because picking was line job integral to growers' overall production process.	Favors finding of joint employment because plaintiffs performed a line-job integral to the harvesting and production of salable vegetables.	Favors finding of joint employment because picking snap beans was integral to both harvesting and producing snap beans, which is the Burtons' business.	Supports finding of joint employment because picking snap beans was integral to both harvesting and producing snap beans, which is the Burtons' business.
Ownership of facilities where work occurred.	Favors finding of joint employment because crop-pickers worked on land owned by Long & Scott.	Favors finding of employment because pickers worked on land owned by growers.	Favors finding of joint employment. No dispute that the work was performed on the Burtons' farm.	Favors finding of joint employment because Burtons owned property where crops were grown.	Supports finding of joint employment because Burtons owned property where crops were grown.
Preparation of payroll and payment of wages.	Does not support finding of joint employment. FLC was responsible for calculating plaintiffs' wages and paying wages.	Supports finding of joint employment. Growers computed and segregated social security taxes and purchased worker's compensation insurance.	Does not favor finding of joint employment. Luxama paid wages. Neither Luxama nor the Burtons prepared a payroll.	Does not support finding of joint employment. Burtons had no responsibility in preparing or making payrolls, paying FICA taxes, or providing worker's compensation insurance.	Does not support finding of joint employment. Burtons had no responsibility in preparing or making payrolls, paying FICA taxes, or providing worker's compensation insurance.

Investment in equip-ment and facilities.	Irrelevant. Shows that plaintiffs were employees, not independent contractors, because they had little or no investment in equipment. It does not show who employed them, however, because Long & Scott and FLC made significant investments in equipment and facilities (for example, FLC invested in trucks, tools, and a labor camp where pickers lived while Long & Scott invested in mule train, crates, and facilities).	Supports finding of joint employment. Growers owned virtually all equipment and facilities used by farm workers: picking boxes, lids and wires used to close them, pallets on which boxes placed, and trucks used to transport boxes to packinghouse. FLC had no equipment or vehicles of his own.	Did not consider, following Aimable's holding that this factor is not relevant to analysis of joint employment.	Does not support finding of joint employment. JWH considered this factor together with the "preparation of payroll ..." factor above (in accordance with AWPA regulations, he considered both factors under the collective heading, "Whether the appellees undertook responsibilities in relation to the appellants that employers commonly perform"),and concluded that although Little Rock provided boxes and a trailer for the Burtons to use, and "[a]lthough the appellees provided certain materials useful in the appellants' work, . . . the appellees did not undertake any other functions that an employer normally performed.")	Irrelevant to this analysis because it supports a finding of economic dependence, but does not address issue of joint employment.
Opportunity for profit and loss.	Irrelevant. Plaintiffs had no opportunity for profit or loss. Although this shows that plaintiffs were not independent contractors, it does not show who their employer was.	Did not discuss.	Did not consider, following Aimable's holding that this factor does not aid the analysis of joint employment.	Did not discuss.	Need not consider as it does not aid the joint employment analysis.

APPENDIX B

[Filed Jul. 1, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CIV. No. 92-150-VAL(WDO)

NICOLAS CHARLES *et al.*,
Plaintiffs,

vs.

JOHN BURTON *et al.*,
Defendants.

ORDER

On March 2, 1994, this court held an evidentiary hearing in the above-captioned case. Plaintiffs allege that defendants violated provisions of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.*, and the Fair Labor Standard Act, 29 U.S.C. § 201 *et seq.* Defendants, however, assert that they are not subject to the requirements of these acts. After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court issues the following order.

FACTS

John and Felix Burton are row crop farmers in Barney, Georgia. In their farming operations, the Burtons principally grow cotton, corn, soy beans, and peanuts. In 1990, however, the Burtons also decided to plant green

beans and cucumbers. Pursuant to an agreement between the Burton and Little Rock Produce Company ("Little Rock"), a local packing shed, and its owner, Bobby Hall, Little Rock supplied the seeds for the bean and cucumber crops, boxes for the harvest, and a trailer in which to transport the beans, in return for the Burtons' promise to market the crops through Little Rock. Under the agreement, the Burtons were responsible for procuring labor to harvest the bean crop, and Little Rock would provide the labor for the cucumber harvest.

To obtain a crew to harvest the 1990 bean crop, the Burtons contacted the Georgia Department of Labor. Through the Department of Labor, the Burtons came in contact with Wilner Luxama, a farm labor contractor. Luxama agreed to provide a labor crew for the Burtons' bean harvest. The 1990 harvest, however, took place too late in the season, and, consequently, Luxama's crew worked only half a day on the Burtons' farm.

The next year, Wilner Luxama and his labor crew returned to the Burtons' farm to harvest the 1991 bean crop.[1] Luxama's crew consisted of approximately twenty-five to thirty-five Florida-based migrant farmworkers. Each morning of the harvest, Luxama would gather his crew and transport them from their temporary housing in Ashburn, Georgia, to the Burtons' farm in Barney, Georgia.[2] At the farm, the Burtons would direct Luxama to the appropriate bean field. Once Luxama and his crew arrived in the field, however, Luxama would direct and supervise the actual harvest, including assignment of

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[1] There are no records, however, to indicate the dates on which the 1991 bean harvest took place.

[2] Ashburn is located approximately fifty miles away from the Burtons' farm. The workers were responsible for securing their own housing in Ashburn, although Luxama would help them with the arraignments.

duties. John and Felix Burton were not involved in the direct supervision of the harvest, although they would check the progress of the harvest approximately two to three times a day.

As the beans were picked, the workers would place the beans in the boxes provided by Little Rock. The workers would receive a ticket for each box harvested. The Burtons paid Luxama a negotiated rate for each box of beans harvested. Luxama would then pay the workers a set price for each ticket the worker received. Luxama, however, did not maintain a payroll, or any other record concerning the workers involved in the harvest. At the end of each day, the beans were loaded onto a trailer owned by Little Rock and transported to Little Rock's packing shed, where the beans were then sold.[3] The 1991 harvest yielded 2,990 boxes of beans.

Because the Burtons were low on funds in 1991, Little Rock was required to advance the Burtons money to meet their labor costs. Under Little Rock's arrangement with the Burtons, those funds would be reimbursed from the proceeds of the bean sales, if sufficient funds existed. In 1991, however, the Burtons failed to make a profit on the bean crop; therefore, Little Rock's advances were not reimbursed.

At roughly the same time the bean harvest was taking place in 1991, the cucumber crop planted by the Burtons was being harvested by a crew supplied by Little Rock. The labor crew for the cucumber harvest was supervised by Ernesto Hernandez, a farm labor contractor employed

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[3] When produce arrives at Little Rock's packing shed, it is examined by a broker, who purchases the produce if it is of marketable quality. If the produce is of non-marketable quality, the broker notifies Little Rock, which then notifies the farmers to stop harvesting.

by Little Rock. The cucumber harvest involved approximately thirty-seven workers over a two-day period.

In 1992, Wilner Luxama and his crew returned to the Burtons' farm to harvest the bean crop. On the morning of June 3, 1992, the pickup truck in which the workers were being transported overturned, killing the driver and two workers, with the remaining workers sustaining serious injuries.

On December 19, 1992, the injured workers, along with the personal representative of one of the deceased workers, brought suit against John Burton, Felix Burton, Little Rock Produce Company, and Bobby Hall, pursuant to the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1801 *et seq.*, and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Plaintiffs contend that defendants violated "registration, vehicle safety, vehicle insurance, recordkeeping, wage statement and wage payment provisions of the AWPA." (Compl. at 2.) Further, plaintiffs allege that defendants "violated the FLSA by failing to pay certain of the Plaintiffs any wages whatsoever for their labor . . . ." (Compl. at 2.) Defendants, however, assert that they are not subject to the requirements of the AWPA and FLSA.

DISCUSSION

The determination of whether defendants are subject to the requirements of the AWPA and the FLSA requires the court to address two issues. First, are defendants "employers" within the meaning of the AWPA and the FLSA? And second, if defendants are "employers" within the meaning of the AWPA and the FLSA, are they entitled to an exemption from the requirements of the Acts?

I. Employer Status

Plaintiffs contend that defendants were "agricultural employers" within the meaning of the AWPA and, therefore, were subject to the statute's various requirements.[4] Plaintiffs bear the initial burden "of establishing the applicability . . . of the Act . . . by a preponderance of the evidence . . . ." *Soliz v. Plunkett*, 615 F.2d 272, 274-75 (5th Cir. 1980).

The AWPA defines the term "agricultural employer" as "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, *employs*, furnishes, or transports any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2) (emphasis added). Further, "[t]he term 'employ' has the meaning given such term under section 3(g) of the Fair Labor Standards Act . . . for

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[4] In their answer to plaintiffs' complaint, John and Felix Burton denied that they were "agricultural employers" within the meaning of the AWPA. However, early in discovery, in response to plaintiffs' first set of interrogatories, the Burtons admitted that they were "agricultural employers," as defined by the AWPA. Subsequently, at the evidentiary hearing, the Burtons contended that they were not "agricultural employers." Plaintiffs argue that the Burtons should be estopped to deny their status as "agricultural employers."

Rule 33 of the Federal Rules of Civil Procedure provides that "answers [to interrogatories] may be used [at trial] to the extent permitted by the rules of evidence." Fed. R. Civ. Pro. 33(c). In contrast, Rule 36, concerning requests for admissions, states that "[a]ny matter admitted under this rule *is conclusively established* unless the court on motion permits withdrawal or amendment of the admission." *Id.* 36(b). It is noteworthy that although Rule 36 provides preclusive effect to admissions, Rule 33 does not provide preclusive effect to answers to interrogatories. Accordingly, although the Burtons' response may be considered by the court as evidence on the issue of the Burtons' status under the AWPA, it is not necessarily conclusive on that issue.

the purposes of implementing the requirements of that Act." *Id.* § 1802(5). Therefore, although the court's discussion will focus on the definition of "agricultural employer" as it is used in the AWPA, the same analysis applies to defendants' status under the FLSA.

In the case *sub judice*, there is no dispute that plaintiffs were employed by Wilner Luxama, a farm labor contractor hired by Felix and John Burton. The employment relationship between Luxama and plaintiffs, however, does not preclude defendants from attaining the status of an "employer" within the meaning of the AWPA; that is, a "joint employment" situation may exist. *See* 29 C.F.R. § 500.20(h)(4)(i). "The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time." *Id.* Plaintiffs contend that they were jointly employed by Luxama and defendants.

Plaintiffs have suggested that the legislative history of the AWPA indicates that the decision in *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir. 1976), is determinative as to the issue of defendants' status as "joint employers" under the AWPA and the FLSA. However, the legislative history of the AWPA does not support plaintiffs' contention. The legislative history of the AWPA recognizes that different standards will apply depending on whether "a defendant-employer/association asserts that the worker in question was not an employee but an independent contractor *or in the alternative that such worker was solely an employee of an independent contractor/crewleader.*" H.R. Rep. No. 97-885, 97th Cong., 2d Sess. 6-7 (1982). In the first situation, the legislative history does indicate that the decision in *Usery* is determinative. *Id.* at 7. However, in the second situation, when the defendant asserts that the migrant worker is an

employee of an independent contractor, the legislative history suggests that the decision in *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973), is controlling. H.R. Rep. No. 97-885 at 7. The facts in the case *sub judice* fall within the second situation; that is, defendants assert that plaintiffs were "solely . . . employee[s] of an independent contractor/crewleader [Wilner Luxama]" and that a joint employment situation did not exist. *Id.* The first situation does not encompass the concept of joint employment as contemplated by the AWPA. Accordingly, the factors set forth in *Hodgson* and its progeny provide the appropriate standard for this court's determination.

The decision is *Hodgson* lists five factors a court should consider in determining whether as a matter of "economic reality," an individual is a joint employer: (1) Whether employment takes place on the premises of the defendant; (2) How much control does the defendant exert over the employees; (3) Does the defendant have the power to fire, hire, or modify the employment condition of the employees; (4) Do the employees perform a "specialty job"; and (5) Whether the employees may refuse to work for the company or work for others? *Hodgson,* 471 F.2d at 238. The decisions subsequent to *Hodgson* have expanded upon the original five factors. Among the factors now considered by the courts are:

> (1) The nature and degree of control of the workers;
>
> (2) The degree of supervision, direct or indirect of the work;
>
> (3) The power to determine the pay rates or the methods of payment of the workers;

(4) The right to hire, fire, or modify the employment conditions of the workers;

(5) Preparation of payroll and payment of wages;

(6) Investment in equipment and facilities'

(7) Opportunity for profit or loss;

(8) Permanency and exclusivity of employment;

(9) Degree of skill required to perform the job;

(10) Ownership of facilities where work occurred; and

(11) Whether the employee performs a "specialty job" integral to the business; [5]

Id. § 500.20(h)(4)(i); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991); *Howard v. Malcom*, 852 F.2d 101, 104 (4th Cir. 1988); *Dnovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973); *Leach v. Johnston*, 812 F. Supp. 1198, 1206 (M.D.Fla. 1992). These factors, however, "are merely guidelines; 'they are not etched in stone and will not be blindly applied.'" *Gilbreath*, 931 F.2d at 1324 (quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). Rather, the court should examine these factors within the context of the "'circumstances of the whole activity.'" *Hodgson*, 471 F.2d at 237.

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[5] The fifth factor set forth in *Hodgson*—whether the employees may refuse to work for the company or work for others—"has never been applied in the agricultural context." *Leach v. Johnston*, 812 F. Supp. 1198, 1207 n.7 (M.D.Fla. 1992).

Although the factors set forth above closely resemble the traditional common law test for determining whether an independent contractor relationship exists, it is clear that "independent contractor status does not necessarily imply the contractor is solely responsible for his employees under the [FLSA and the AWPA]. Another employer may be jointly responsible for the contractor's employees." *Id.*[6] Likewise, however, simply because an individual is employed by a farm labor contractor does not necessarily make that individual an employee of every person with whom the contractor contracts. *See Howard,* 852 F.2d at 105.[7]

The Eleventh Circuit Court of Appeals has recently addressed the proper application of the eleven factors outlined above. *Aimable,* 20 F.3d at 436. In reviewing the factors, the Eleventh Circuit held that when the issue is one of joint employment status, factors six, seven, eight, and nine are not applicable. *Id.* at 443-444. "[These] factor[s] . . . [are] not used to determine joint employment status . . ., but rather to determine whether workers were employees or independent contractors." *Id.* at 443; *see also id.* at 444 ("[these factors] are of no

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[6] "[T]he terms 'employee', 'employer' and 'independent contractor' [should] not be construed in their limiting common law sense." H.R. Rep. No. 97-885, 97th Cong., 2d Sess. 6 (1982).

[7] In this regard, the court must reject the version of the "economic realities" test adopted by the court in *Leach v. Johnston,* 812 F. Supp. 1198 (M.D. Fla. 1992). Under that formulation of the test, an employment relationship would be defined on the basis of whether the plaintiff was "*ultimately* economically dependent upon" the defendant. *Leach,* 812 F. Supp. at 1206, 1208 (emphasis added). If "ultimate economic dependence" was the determinative circumstance, the test, and the factors outlined above, would have little meaning in that every employee of a farm labor contractor could be found ultimately dependent for their livelihood on the individual who has hired the contractor.

value to joint employment determinations"). Accordingly, as the issue in the case *sub judice* is whether defendants were the joint employers of plaintiffs, the court will review plaintiff's employment status in light of the following factors:

> (1) The nature and degree of control of the workers;
>
> (2) The degree of supervision, direct or indirect, of the work;
>
> (3) The power to determine the pay rates or the methods of payment of the workers;
>
> (4) The right to hire, fire, or modify the employment conditions of the workers;
>
> (5) Preparation of payroll and payment of wages;
>
> (6) Ownership of facilities where work occurred; and
>
> (7) Whether the employee performs a "specialty job" integral to the business;

A. *Nature and degree of control of workers*

Plaintiffs suggest that the decision in *Leach v. Johnston*, 812 F. Supp 1198 (M.D. Fla. 1992), should guide the court in its determination of the nature and degree of control defendants maintained over plaintiffs. In *Leach*, the court found that the defendant farmer maintained a "significant degree of control" over the farm labor contractor's crew by virtue of the act that the farmer "made all decisions regarding the planting, irrigating and cultivating of crops; the application of pesticides and herbicides; and decisions regarding the sale and marketing of the crops." *Leach*, 812 F. Supp. at 1207. "Control," however, must means something more than simply a restatement of the

farmer's role in agriculture. A farmer will almost always be responsible for decisions concerning "planting, irrigati[on,] cultivati[on,] . . . application of pesticides and herbicides[, and] . . . the sale and marketing of the crops." *Id.* In this regard, the decision in *Donovan v. Brandel,* 736 F.2d 1114 (6th Cir. 1984), offers a definition of "control" more in line with the realities of agricultural employment; that is "whether [the defendant] retain[ed] the right to dictate the manner in which the details of the harvesting function are executed." *Donovan,* 736 F.2d at 1119.

Further, in *Aimable v.. Long & Scott Farms,* 20 F.3d 434 (11th Cir. 1994), the Eleventh Circuit Court of Appeals explicitly rejected the definition of "control" suggested by plaintiffs. *Aimable,* 20 F..3d at 440-41. In rejecting plaintiffs' definition, the Eleventh Circuit wrote:

> Although, at first glance, the . . . factor may appear to encompass abstract notions of control such as th[ose suggested by plaintiffs], its focus is more properly limited to specific indicia of control. . . .
>
> Control arises . . . when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work.

Id. at 440-41.

In the case *sub judice,* there is absolutely no indication in the record that defendants Bobby Hall and Little Rock retained the "right to dictate the manner in which the details of the harvesting function [were] executed." *Donovan,* 736 F.2d at 1119. Further, although defendants John and Felix Burton retained a degree of control over the harvest in that they directed which fields would be

picked, they maintained no control over the *manner* in which the beans were picked. The details of the harvest were left to Wilner Luxama.

B. *Degree of supervision, direct or indirect, of the work*

"[T]estimony that [a defendant] supervised the harvest work tends to indicate an employment relationship." *Hodgson*, 471 F.2d at 238. According to Wilner Luxama, the Burtons would check the progress of a harvest perhaps two or three times a day. (Luxama Dep. at 43-44.) Luxama, was primarily responsible for the supervision of the workers. (Luxama Dep. at 43.)[8] Accordingly, although the record reveals that the Burtons maintained a degree of supervision over the work, that supervision was extremely limited. "[Plaintiffs'] infrequent assertions of minimal oversight by [the Burtons] do not rise to the level of supervision necessary to satisfy this factor." *Aimable*, 20 F.3d at 441. In addition, the record clearly indicates that defendants Bobby Hall and Little Rock maintained no supervision, direct or indirect, over the work of plaintiffs.

C. *Power to determine pay rates or the method of payment of the workers*

How much plaintiffs were to receive for their work, when they were to receive payment, and the manner in which they were to receive payment, were decisions mad by Wilner Luxama.[9] Plaintiffs, however, contend that because their rate of pay necessarily depended on the

---

[8] *See also* Pls.' Memo. Regarding Defs.' Entitlement to "Small Business" Exemption at 2 ("Luxama . . . supervised [plaintiffs'] work . . .").

[9] "Luxama . . . paid [plaintiffs] their wages. Luxama was paid an agreed-upon rate for his services and from this amount paid

amount defendants paid Luxama, defendants in fact determined the pay rate of plaintiffs. Plaintiffs' contention is without merit. The Eleventh Circuit Court of Appeals has recently rejected this very argument. *See Aimable*, 20 F.3d at 442.

> [Plaintiffs'] argument follows the transitive property of geometry: first, [defendants] controlled the amount [Luxama] received; second [Luxama] controlled the amount [plaintiffs] received; therefore, [defendants] controlled the amount [plaintiffs] received. This relationship is validated, [plaintiffs] assert, by [Luxama's] refusal to pay [plaintiffs] more money unless he received more money from [defendants]. To summarize, because of [Luxama's] intransigence regarding pay increases, [plaintiffs] conclude that they were economically dependent upon—and thus employees of—[defendants].
>
> * * *
>
> Unfortunately for [plaintiffs], the laws that bind the Euclidian world do not apply with equal force in federal employment law; the [plaintiffs] leap of logic is unfounded.

Id.

D. *Right to hire, fire, or modify the employment conditions of the workers*

There is no evidence in the record that defendants had the authority to hire or fire the individual workers employed by Wilner Luxama. Further, in determining whether a defendant-farmer has the authority to modify the employment conditions of workers, courts have looked

---

the workers' wages and his operating expenses." (Pls.' Memo. Regarding Defs.' Entitlement to "Small Business" Exemption at 2.)

at factors such as who controlled the number of hours each employee would work, who determined the tasks each employee would perform, and who was responsible for the workers' housing. *See Aimable*, 20 F.3d at 442; *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Leach*, 812 F. Supp. at 1207. In the case at hand, the amount of time Wilner Luxama's crew could work on the Burton's farm was determined by a variety of factors, including: the weather, the size of the beans, the size of the crew, the skill of the crew, and the acreage available. However, within the time allowed by these factors, Wilner Luxama controlled the number of hours each individual employee worked. Luxama also controlled the tasks each worker would perform. As pointed out by plaintiffs' counsel, not every worker involved in the harvest actually picked beans. For example, some workers were involved in the collection of the boxes and the distribution of the tickets. The decision as to who performed what task was left to Luxama, not the defendants.

Finally, according to Wilner Luxama, the workers were responsible for finding their own housing. Therefore, unlike the defendants in *Leach*, defendants in the case *sub judice could* not modify the housing arrangements of the workers. Accordingly, the record does not support a contention that defendants had the authority to modify the plaintiffs' employment conditions.

E. *Preparation of payroll and payment of wages*

As discussed above, Wilner Luxama was responsible for the payment of wages to plaintiffs. In fulfilling this duty, however, Luxama did not prepare a payroll. Further, a payroll was not prepared by any of the defendants.

F. *Ownership of facilities where work occurred*

There is no dispute that the work took place on the Burtons' farm. However, there is absolutely no evidence that any of the plaintiffs performed any work on the property of either Bobby Hall or Little Rock.

G. *Whether the employees perform a "specialty job" integral to the business*

As plaintiffs "performed a line-job integral to the harvesting and production of salable vegetables," this factor tends to support a conclusion that plaintiffs were employees of defendants. *See Aimable,* 20 F.3d at 444.

After a careful review of the factors discussed above, the court finds that Bobby Hall and Little Rock Produce Company did not "employ" plaintiffs within the meaning of the AWPA. Further, the factors also strongly suggest that John and Felix Burton were not the "joint employers" of plaintiffs. The record indicates that the Burtons retained no direct control over the work of the harvesters, exercised only cursory supervision over the harvest, did not determine the workers' pay rate or the method of payment, did not have the authority to hire or fire the individual crew members, could not modify the employment conditions of the individual workers, did not pay the workers, and were not responsible for the preparation of a payroll. Plaintiffs, however, argue that the court should look beyond the significance of any particular factor and delve into the "economic reality" of the relationship. According to plaintiffs, the reality of the employment situation is that the migrant workers were economically dependent on defendants. As plaintiffs' counsel asserted at the evidentiary hearing, defendants retained untimate control over when plaintiffs worked and the wage plaintiffs would receiver for that work.

If the court were to accept plaintiffs argument, however, every farmer who hired a farm labor contractor would become for purposes of the AWPA and the FLSA a joint employer of the contractor's employees. An "economic reality" test that sweeps as broad as plaintiffs suggests is no test at all; it is a mere formality. The legislative history of the AWPA recognizes that there will be situations in which a farmer is not held to be the joint employer of a farm labor contractor's employees. *See* H. R. Rep. No. 97-885 at 7. The factors discussed above, although "merely guidelines," nonetheless give significant direction as to the resolution of defendants' status under the AWPA and the FLSA. Accordingly, after a careful review of the case law, the text of the acts, the legislative history, and the federal regulations, the court holds that John Burton, Felix Burton, Bobby Hall, and Little Rock Produce Company were not the "joint employers" of plaintiffs.

II. Exemptions

As defendants John and Felix Burton do not fall within the AWPA's definition of a "joint employer," the issue of whether defendants are entitled to a "small business" exemption from the Act is moot. However, in order that the record might be complete as to all issues raised at the evidentiary hearing, the court will proceed to address the exemption issue.

29 U.S.C. § 1803 provides, in part: "The following persons are not subject to [the requirements of the AWPA]: . . . Any person, other than a farm labor contractor, for whom the man-days exemption for argicultural labor provided under section 13(a)(6)(A) of the . . . [FLSA] is applicable." 29 U.S.C. § 1803(a)(2). The may-days exemption of the FLSA applies to "any employee employed in agriculture . . . if such employee is employed by an employer who did not, during any cal-

endar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor . . . ." *Id.* § 213(a)(6). A "man-day" is "any day during which an employee performs any agricultural labor for not less than one hour." *Id.* § 203(u).

"An exemption from the coverage of the [FLSA] 'must be narrowly construed.' The exemptions must be applied only to those 'plainly and unmistakeably within its terms and spirit.'" *Hodgson v. Colonnades, Inc.*, 472 F.2d 42, 47 (5th Cir. 1973); *see also Donovan v. Williams Chemical Co.*, 682 F.2d 185, 191 (8th Cir. 1982). Further, "[a]n employer who asserts it is exempt from the Act 'has the burden of establishing the exemption affirmatively and clearly.'" *Donovan*, 682 F.2d at 191.

The accident forming the basis of plaintiffs' claims took place in 1992. Accordingly, to determine if defendants John and Felix Burton are entitled to the "small business" exemption, the court must focus its inquiry on the preceding calendar year. Of the year 1991, only the second quarter—that is, April, May, June—presents an issue as to whether five hundred man-hours of agricultural labor were performed on the Burtons' farm.

The Burtons did not maintain records for the period at issue concerning the number of workers involved in the bean harvest, the dates on which the harvest took place, or the hours each harvester worked in the field. Consequently, the Burtons have attempted to meet their burden by indirect means.

According to the Burtons, the record establishes the following "variables":

(1) Fourteen acres of beans were planted;

(2) 2,990 boxes of beans were picked;

(3) The beans have a growth rate of 48-60 days;

(4) The beans have a 3-5 day window of commercial viability in which the beans must be picked;

(5) 30-32 workers were involved in the harvest;

(6) The harvesters work an average of eight plus hours each day; and

(7) A worker averages sixteen boxes per day.

The Burtons contend that although a record was not maintained of the exact man-days worked, the above variables prove that it was not possible to have worked over five hunded man-days in the 1991 harvest. For example, the above figures indicate that if thirty-two workers, averaging two boxes per hour, worked eight hours a day to harvest 2,990 boxes of beans, it would take 5.84 days to complete the harvest. The harvest, therefore, would have involved 186.88 man-days of agricultural labor. Further, the Burtons assert that even if the court were apply the above variable in varying degrees, the maximum man-days that would be possible is 427.14.

The Burtons' calculations, however, present a number of problems. First, the actual number of days on which the harvest took place in 1991 is unknown. Although the court can make a generalized assumption of the number of days of harvest on the basis of the window of opportunity and growth rates, the court has no way of knowing if the window of opportunity was adhered to by the Burtons, or if the weather, or other factors, affected the growth rate of the beans to a significant degree.

Second, the actual number of workers involved in the 1991 harvest is unknown. The record indicates that a range of anywhere from twenty-eight to thirty-four, or more, workers may have participated in the harvest. Ac-

cordingly, the court has no basis for limiting the range in the manner suggested by defendants.

Third, defendants' assertion that the "average" work day of a harvester is eight plus hours is irrelevant to a determination of the actual hours worked by each harvester in 1991. There is simply no record or testimony that in any way establishes the actual number of hours each harvester worked each day on the Burton's farm in 1991. Accordingly, the court is merely left to speculate over how many hours the harvesters "may" have worked in 1991. In light of defendants' burden on this issue, such speculation is unwarranted.

Fourth, although the harvesters may pick an average of two boxes of beans each hour, this figure is, as was the "average" workday figure, irrelevant to the question of how many boxes each worker actually picked in 1991. As the record indicates, the number of boxes an individual can pick in a day depends on a number of factors, including: the age of the harvester, the gender of the harvester, the experience of the harvester, the weather, and the quality of the beans. Because these factors heavily influence the productivity of any given individual, the court cannot accept the "average" productivity of a worker as the basis for an exemption.

Finally, the figures set forth by the Burtons do not take into account the man-days involved in the 1991 cucumber harvest. The record maintained by Ernesto Hernandez indicate that the cucumber harvest involved an average of thirty-seven workers over a two day period in June 1991. Therefore, the calculation of man-days involved in the bean harvest must begin with the fact that seventy-four man-days of agricultural labor were expended in the cucumber harvest. As discussed above, using the "variables" set forth by the Burtons, it is possible that in 1991, 427.14

man-days of agricultural labor were involved in the bean harvest. Accordingly, if the cucumber harvest is added into the bean harvest total, the man-days exceed five hundred.

The indrect means by which the Burtons have attempted to show their entitlement to the small business exemption rests on assumptions with no firm support in the record. The record gives rise to a wide variety of man-day calculations, none of which has a greater validity than any other. Accordingly, the Burtons have not shown "affirmatively and clearly" that they are entitled to the small business exemption.

CONCLUSION

Defendants John Burton, Felix Burton, Bobby Hall, and Little Rock Produce Company did not "employ" plaintiffs within the meaning of the AWPA and the FLSA. Further, although the issue is moot because of the holding in Part I of this order, the court holds that defendants John and Felix Burton are not entitled to the small business exemption.

SO ORDERED, this 1st day of July, 1994.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

APPENDIX C

[Filed Sep. 5, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

7:92-cv-150 (WDO)

NICOLAS CHARLES, *et al.*,
Plaintiffs,

vs.

JOHN BURTON, *et al.*,
Defendants.

ORDER

Before the court is defendants John and Felix Burton's motion for summary judgment. After careful consideration of the relevant case law and the record as a whole, the court issues the following order. The facts of this case are set forth in *Charles v. Burton*, 857 F.Supp. 1574 (M.D. Ga. 1994).

Plaintiffs allege that defendant-farmers John and Felix Burton are liable under 29 U.S.C. § 1842 for violating the registration verification provisions contained in the Agricultural and Seasonal Workers Protection Act (the "Act"). Defendants request that this court hold that only statutory damages up to a maximum amount of $500.00 per violation per plaintiff can be awarded for a violation of the registration verification provisions of 29 U.S.C. § 1842. Section 1842 provides in part:

> No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor prossesses a certificate of registration which is valid and which authorizes activity for which the contractor is utilized. . . .

29 U.S.C. § 1842. In their motion for summary judgment, defendants concede that they did not check the certificate of registration of the farm contractor, Wilner Luxama. The issue is therefore not whether defendants violated § 1842; rather, defendants have forced consideration on the question of damages.

Damages are determined, for purposes of the Act, in accordance with 29 U.S.C. § 1854(c)(1).

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to [1] the amount of actual damages, or [2] statutory damages of up to $500 per plaintiff per violation . . . .

29 U.S.C. § 1854(c)(1).

The defendants allege there are no *actual damages* as a result of the violation of 29 U.S.C. § 1842 and that only statutory damages at a maximum of $500.00 should be assessed. The plaintiffs contend that actual damages were suffered in the form of inability to obtain medical care and lack of compensation for lost wages during their period of convalescence. The defendants request that the court establish a maximum for damages under 29 U.S.C. § 1854(c)(1) at $500.00 per plaintiff per violation.

The term 'actual damages" is synonymous with general damages. BLACK'S LAW DICTIONARY 467 (4th ed. 1968). General damages are thought of being those that "generally" flow from the kind of substantive wrong done by the defendant. In the court's considered judgment, defendants' failure to check Mr. Luxama's certificate of registration is simply too far removed from the type of harm complained of for actual damages to be attributable to defendants.

Although the court has not been able to locate a case discussing an attribution requirement for damages on account of the use of "actual" damages limitation, perhaps common sense has influenced litigants that strict liability should not be the rule under a statute such as the AWPA, where the court is clearly given the discretion to choose between actual and statutory damages. *See, e.g., Ricketts v. Vann*, 861 F. Supp. 404, 406 (E.D. N.C. 1993) (parties agree that for recovery of actual damages under AWPA, plaintiff must show particular violation was proximate cause of the damages suffered), *aff'd on other grounds*, 32 F.3d 71 (4th Cir. 1994). The court is aware that statutory schemes "intended for the protection of employees" are generally construed as imposing a rule of strict liability. WILLIAM L. PROSSER, LAW OF TORTS § 81, at 538 (4th ed. 1971). However, the court finds that the general construction is inapposite here, where the statute clearly provides the court with the discretion to choose between imposition of actual and statutory damages, *see Aimable v. Long and Scott Farms*, 20 F.3d 434, 438 (11th Cir. 1994) (citing 29 U.S.C. §§ 1854(a) & (c)); where use of the descriptive "actual" denotes a causal requirement, *see* BLACK'S LAW DICTIONARY 467 (4th ed. 1968); and where the legislative history fails to adopt a position on the necessity of strict liability to achieve its purposes, *see* H.R. REP. No. 97-885, 97th

Cong., 2d Sess., at 32 (1982), *reprinted in* 1982 U.S C.C.A.N. 4547, 4578.

In light of this, the court GRANTS DEFENDANTS' SUMMARY JUDGMENT MOTION to the extent that it requests a finding that they shall not be held liable under the AWPA for actual damages incurred by plaintiffs. Statutory damages, up to $500 per plaintiff, may still be awarded however. This does not mean that the court must award $500 per plaintiff, only that it may do so.

SO ORDERED, this 5th day of September, 1995.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

BW

APPENDIX D

[Filed Jul. 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

Case Number 92-150-VAL(HL)

NICOLAS CHARLES, *et al.*,
Plaintiffs

VS.

JOHN BURTON, *et al.*,
Defendants

ORDER

This order decides the plaintiffs' Motion for Summary Judgment and assessment of damages for defendants' violation of 29 U.S.C. § 1842. The facts of the case are set forth in a prior opinion. *Nicolas Charles, et al. v. John Burton, et al.*, 857 Fed.Supp. 1574. The defendants admit the alleged violations and that the only issue for decision is the amount of damages, which may not exceed $500 per plaintiff.

The Court finds that the violations were technically intentional; that the violations caused a substantial harm to the plaintiffs; and that the statute was designed to protect the plaintiffs from such harm.

The Court also finds that the defendants have been guilty of no prior similar violations; that it was not unreasonable for the defendants to assume that Luxama was

qualified to provide a crew because Luxama had been referred to plaintiffs by the State Department of Labor; and that the violations were not a knowing, willful and flagrant disregard of the law.

The Court has also considered what some might reasonably convince the defendants that it is economically more advantageous to comply with the law than to disregard it.

Considering and balancing these factors, the Court in the exercise of its discretion awards damages to each plaintiff in the sum of $350 for which the defendants shall be jointly and severally liable.

SO ORDERED, this the 25th day of July, 1996.

/s/ Hugh Lawson
HUGH LAWSON, Judge
United States District Court

APPENDIX E

[Filed May 26, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-9212

NICOLAS CHARLES; CHARITE ASSEIGNE, *et al.*,
Plaintiffs,
Counter-Defendants,
Appellants,
Cross-Appellants,

versus

JOHN BURTON; FELIX BURTON, *et al.*,
Defendants,
Counter-Claimants,
Appellees,
Cross-Appellants.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING *EN BANC*

Before: HATCHETT, Chief Judge, and RONEY and CLARK, Senior Circuit Judges.

ing from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker.

* * * *

29 U.S.C. § 1842. Confirmation of registration

No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized. In making that determination, the person may rely upon either possession of a certificate of registration, or confirmation of such registration by the Department of Labor. The Secretary shall maintain a central public registry of all persons issued a certificate of registration.

29 U.S.C. § 1854. Private right of action

* * * *

(c) Award of damages or other equitable relief; amount; criteria; appeal

(1) If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

* * * *

Supreme Court, U.S.
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No. 99-338

IN THE
Supreme Court of the United States

JOHN BURTON AND FELIX BURTON,
Petitioners,

v.

NICOLAS CHARLES, CHARITE ASSEIGNE, MIGUEL AUBOUT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS IN SUPPORT OF PETITIONERS

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P.L. 97-470, 1982 U.S.C.C.A.N. (96 Stat.) 4547, 4553 16

P.L. 97-470, 1982 U.S.C.C.A.N. (96 Stat.) 4552-3 7

UNENACTED BILLS

Agricultural Worker Protection Reform Act of 1993, H.R. 1173, 103rd Cong. 16-17

MISCELLANEOUS

1992 Census of Agriculture, U.S. Census Bureau..5, 19-20

Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkeley J. Employment & Lab. L. 175 (1998) 10, 18, 20

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS IN SUPPORT OF PETITIONERS

The National Council of Agricultural Employers (NCAE) respectfully submits this brief *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of this Court. This brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

NCAE is a national association based in Washington, D.C. that represents growers and agricultural organizations on agricultural labor and employment issues. NCAE's membership includes agricultural employers with operations in all 50 states who hire about 75 percent of the national agricultural workforce. Its members include farm cooperatives, growers, packers, processors and agricultural associations.

NCAE's experience representing agricultural employers gives the organization the appropriate background to provide meaningful comments and insight into issues concerning worker and management relations in the agricultural industry.

Many NCAE members are growers of agricultural products who use independent contractors, commonly known as farm labor contractors (FLC's), to provide farm workers to harvest their crops. NCAE's members are subject to the provisions of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.* (1998 & Supp. 1999) (MSPA) and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1998 & Supp. 1999) (FLSA), and, specifically, the rules govern-

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

ing "joint employment" under MSPA. The decision below misapplies the law governing "joint employment" of workers by an FLC and an agricultural grower. Thus, the issues presented in the petition are extremely important to NCAE's members.

The Eleventh Circuit's decision significantly and directly impacts NCAE members who utilize and rely on farm labor contractors. It will impede the use of FLC's which will hurt agricultural growers and the agricultural industry, as well as farm workers throughout the United States. Small agricultural employers who constitute a significant part of the agricultural industry in this country will be especially affected by such strict liability standards. NCAE seeks interpretation and application of the "joint employer" rules in a way that not only furthers the purposes of MSPA but also provides stability to the agricultural labor market in the United States.

STATEMENT OF THE CASE

In 1990, the Burtons and Little Rock Produce Company entered into a joint venture to harvest crops. Pet. App. at 2a. The Burtons were responsible for obtaining labor for the bean crop. Pet. App. at 3a. The Georgia Department of Labor referred the Burtons to Wilner Luxama, a farm labor contractor. Pet. App. at 3a. The Burtons retained the services of Luxama to provide farm labor for the bean crop. Pet. App. at 3a.

Luxama recruited a crew of workers from Miami to pick crops in Georgia, including at the Burtons' farm. Pet. App. at 3a. Upon arriving in Georgia, Luxama assisted his workers in finding housing, which was located fifty miles from the Burtons' farm. Pet. App. at 3a, 34a. Luxama's duties included transporting the crew from their housing to the Burtons' farm each day and back. Pet. App. at 3a. Each day, Luxama assigned the workers their tasks and duties, determined how the crop should be picked, and directed and supervised the harvesting and

picking of beans. Pet. App. at 3a, 11a, 13a, 34a, 35a, 44a, 46a. Luxama decided when the picking should begin each day and controlled how many hours each worker would work. Pet. App. at 12a, 46a. Luxama also was solely responsible for determining whether to discipline any workers. Pet. App. at 12a. At the end of the day, Luxama weighed each of the boxes of beans and then his crew loaded the boxes on a trailer, which was owned by the packing house. Pet. App. at 4a. Luxama was solely responsible for deciding the workers' pay rate, and when and how to pay the workers. Pet. App. at 3a, 14a. Luxama decided to pay his workers based on the number of boxes they filled with beans. Pet. App. at 3a. The boxes were provided by the packing house. Pet. App. at 3a. Some days, Luxama would send his workers to pick crops at other farms and, on other days, some workers chose to stay at home. Pet. App. at 16a, 17a.

After planting and fertilizing the bean crop, the Burtons' activities were limited to paying Luxama a flat rate per box of beans, directing Luxama to the field to be picked each day, observing the progress of the harvest two or three times a day, and transporting the packing house's trailer to the packing house after it was loaded. Pet. App. at 3a, 4a, 14a. The Burtons did not have the ability to hire or fire the workers, did not determine the workers' pay rate, and did not prepare payroll records, pay FICA taxes or provide workers' compensation insurance. Pet. App. at 20a, 47a.

In 1991, Luxama's farm labor contractor registration lapsed. Pet. App. at 4a. On June 3, 1992, while Luxama was not registered, one of the trucks Luxama used to transport the farm workers between their housing and the Burtons' farm overturned. Pet. App. at 4a, 5a. As a result of the accident and injuries suffered, the plaintiffs commenced this law suit against the Burtons alleging violations of MSPA and FLSA. Pet. App. at 5a.

impacting American agricultural operations. *See Parker v. Flook*, 437 U.S. 584, 587-88 (1978) (certiorari granted because of the "importance of the question" and the "debilitating effect" the lower decision may have "on the rapidly expanding computer 'software' industry"). Moreover, NCAE submits that the Court should address the issue of imposing a strict liability joint employment standard on agricultural growers at its infancy prior to the Eleventh Circuit's approach being adopted by other federal courts considering similar joint employment cases. *See, American Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("question being an important one of first impression under the [statute], we granted certiorari").

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REVIEW THE DECISION OF THE COURT BELOW WHICH IMPROPERLY ESTABLISHED A *DE FACTO* STRICT LIABILITY STANDARD TO IMPOSE JOINT EMPLOYER LIABILITY ON GROWERS WHO UTILIZE FARM LABOR CONTRACTORS.

A. DOL's Joint Employer Regulation Issued Contemporaneously With MSPA Did Not Impose a Strict Liability Standard.

The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.*, (MSPA) was enacted in 1983, in part with the intent to more effectively regulate the conduct of farm labor contractors (FLC's). It replaced its predecessor statute, the Farm Labor Contractor Registration Act. Pub. L. No. 88-582, 78 Stat. 920 (1963) (repealed 1983). FLC's play an important role in supplying workers to growers during peak production and harvest periods. While FLC's often hold themselves out as independent contractors to growers who pay a fee for their services, and as the employer of the workers they supply, MSPA's incorporation of the joint employment principle from the Fair Labor Standards Act

(FLSA), 1982 U.S.C.C.A.N. 4552-3; 29 C.F.R. § 500.20 (h)(5)(ii), sought to go beyond labels and evaluate the nature of the FLC-grower relationship. The economic dependence of the workers upon the FLC and/or grower is a fundamental concept in such an analysis. Such an evaluation involves the application of the regulatory factors established in U.S. Department of Labor (DOL) regulation to all the facts, and the determination of whether joint employer status exists depends upon the totality of the circumstances in the case. If, after evaluating all the facts in the case in light of the regulatory factors, the grower and FLC are found to be joint employers of the workers, both parties are liable for any damages resultant from the FLC's failure to comply with MSPA or FLSA.

Under the original DOL joint employment regulation issued in 1983, the regulatory factors were applied to determine whether a joint employment relationship existed and often led to different outcomes. *Compare, Aimable v. Long and Scott Farms*, 20 F.3d 434 (11th Cir. 1994) (grower was found not to be the joint employer of the workers with the FLC) and *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) (growers were found to be the joint employers with the FLC).

The original DOL regulation set forth five significant factors, albeit not exclusive, for courts to consider in evaluating potential joint employment situations.[3] In 1997, the Department of Labor revised these rules that govern the theory of joint employment under MSPA.

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[3] The original DOL regulations, which were applied by the district court in this case, included the following factors: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5) preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4) (1996).

B. The Eleventh Circuit Court of Appeals' Application of the 1997 Joint Employer Regulation Demonstrates That It is a *De Facto* Strict Liability Standard.

The 1997 revised regulation, which the Eleventh Circuit applied retroactively, set forth seven non-exclusive factors that should be considered by courts to determine whether the workers are considered to be "economically dependent" on the growers and, hence, joint employees of the grower and FLC. The seven factors are as follows:

A. Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (*such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight* and coordination with third parties);

B. Whether the agricultural employer/association has the power, either alone or in addition to another employer, *directly or indirectly*, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

C. The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

D. The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

E. Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

F. Whether the work is performed on the agricultural employer/association's premises, rather

than on premises owned or controlled by another business entity; and

G. Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

29 C.F.R. § 500.20(h)(5)(iv) (1998) (emphasis added).

The Eleventh Circuit interpreted the revised Department of Labor "joint employment" regulation to hold that the growers were joint employers with the FLC of the migrant contract workers.[4] The Eleventh Circuit's interpretation of the regulation and, specifically, several of these factors, creates a virtual strict liability situation for any grower who hires an FLC who violates the FLSA and/or MSPA.[5]

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[4] The joint employment regulation applied by the Eleventh Circuit was the revised regulation that was not effective until April 11, 1997. The Eleventh Circuit applied the revised regulation, not the original regulation, despite the fact that the district court had applied the original regulation in its analysis of the case. In addition, the revised regulation was not in effect when the growers entered into the contractual relationship with the FLC, at the time of the underlying motor vehicle accident, the date on which this action was commenced by plaintiffs, or the date on which the district court issued its decision.

[5] NCAE was concerned that DOL's proposed revision of its joint employment regulation would create a strict liability standard. In NCAE's comments to the Department of Labor in 1996 during the rulemaking period, it submitted:

> . . . a likely effect of the proposed rule will be to shift liability to agricultural employers who now invariably will be held li-

Of the seven new regulatory factors set forth above and applied by the Eleventh Circuit to reverse the district court, factors identified as D, E, and F, above, almost invariably are found to occur in agricultural employment, hence evidencing a joint employment relationship. Farm production and harvest tasks are typically repetitive tasks, with the level of skill required of harvest tasks typically not requiring extensive training (Factor D).[6] Farm work, such as production and harvesting, is usually integral to the farm owners overall operation (Factor E).[7] Farm work also is typically performed on a farm (Factor F). Predictably, these factors were found by the Eleventh Circuit to evidence joint employment in the instant case.

Thus, the critical factual determinations in a joint employment analysis that can have different outcomes center on factors identified as A, B, C and G, above. Pay practices vary greatly in grower-FLC relationships. Luxama, the FLC, paid the workers. The Eleventh Circuit, there-

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able under what is tantamount to a strict liability standard for the actions of FLC's they use.

In response, in the final rule, the Department of Labor stated that the regulation was not to be construed as imposing a strict liability standard. *See*, 62 Fed. Reg. 11738 (1997). Notwithstanding DOL's position, the Eleventh Circuit's decision in this case confirms the fears expressed in NCAE's comments. Furthermore, Professor Michael H. LeRoy insightfully commented on *Charles v. Burton* following the district court decision in this case but prior to the Eleventh Circuit's decision. *See*, Petitioner at 22 (quote taken from Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 Berkeley J. Employment & Lab. L. 175, 213 (1998)).

[6] Eleventh Circuit Court Judge Roney, in his dissent, referenced an earlier Eleventh Circuit case on joint employment, *Aimable v. Long and Scott*, 20 F.3d 434 (11th Cir. 1994), to support his position that the degree of skill necessary to perform the job is irrelevant to the issue of joint employment. Pet. App. at 31a.

[7] The Eleventh Circuit made this finding despite evidence that the bean harvest was only a "small percentage" of the Burtons' overall farming operation. Pet. App. at 18a.

fore, correctly found Factor G not to support a finding of economic dependence upon the growers.

Factor C requires an analysis of the permanency and duration of the relationship between the workers, FLC and growers. This factor also varies greatly. In the instant case, the Eleventh Circuit found that there was not sufficient permanency and duration to the relationship between the petitioners and the workers or Luxama, the FLC, to find that there was economic dependence.

Thus, the outcome of this case depended on the analysis of Factors A and B.

C. The Eleventh Circuit's Analysis of the Growers' Power to Control, Supervise and Modify the Employment Conditions of the Workers Found The Most Minimal Contact To Evidence Economic Dependence, Thereby, Imposing a *De Facto* Strict Liability Standard.

The Eleventh Circuit's application of Factors A and B, reflects a *de facto* strict liability standard. Factor A considers whether the growers had the power to direct, control or supervise the workers, *directly or indirectly*. The Eleventh Circuit concluded that a sufficient showing was made to establish that the growers controlled the workers and directly or indirectly supervised them so as to suggest evidence of joint employment. The facts relied upon by the Eleventh Circuit to reach this conclusion reflect the absolute minimal amount of direct or indirect control and supervision of farm workers that could occur in a grower-farm labor contractor relationship without the grower relinquishing its fundamental non-labor related business management decisions to an FLC. 29 C.F.R. § 500.20 (h)(5)(iv)(A) (1998); 62 Fed. Reg. 11740 (1997).

The only factor the court found to show that the petitioners exhibited some control is that they "determined the particular fields that they wanted the appellants to cultivate, determined when the appellants would begin

picking each field and supplied appellants with boxes that Little Rock provided." Pet. App. at 12a.[8]

Similarly, in finding that the growers exercised supervision over the farm workers, the Eleventh Circuit found economic dependence simply because the petitioners told the FLC which areas of the farm to harvest and monitored the farms several times a day. Without citing any direct contact or supervision of the workers, the Eleventh Circuit concluded that the mere "monitoring" of the fields and crops they owned, and conversing with the FLC, without considering the content of such conversation, constituted supervision. The logical extension of this conclusion is that a person who enters into a contract for services cannot oversee the performance of those services on his/her property nor communicate with the party with whom the contract was entered. Such a result ignores the reality of the market place and even the provisions of DOL's regulation that allow growers to conduct such basic commercial practices without thereby acquiring joint employer status. The regulation specifically provides that a "reasonable degree of contract performance oversight" needs to be taken into account when evaluating this factor. 29 C.F.R. § 500.20(h)(5)(iv)(A) (1998); *see also*, 62 Fed. Reg. 11739-1740 (1997). DOL stated in the publication of the final joint employer rule in 1997 as follows:

> The agricultural employer/association may certainly take action during or after the conclusion of the work to confirm satisfaction of the contract's ultimate performance standards (including appearing in the field and communicating with the FLC about

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[8] This very concept of control as evidence of economic dependence was rejected by the Eleventh Circuit in *Aimable v. Long and Scott Farms*, 20 F.3d 434, 440 (11th Cir. 1994), which held that determining the amount of crop to harvest, which parcels of land to harvest, when to begin harvesting and how frequently the fields should be harvested did not constitute economic dependence for purposes of determining joint employment. *Id.*

> general observations concerning the performance of the contract standards, such as ripeness or size of the produce harvested) without this action alone being considered an indicum of joint employment.

62 Fed. Reg. 11740 (1997).

Factor B, above, examines whether the petitioners had the direct or indirect power to hire, fire, or modify the employment conditions or determine the pay rates or the methods of wage payment for the farm workers. Finding no direct evidence that the petitioners exercised power over the workers with respect to hiring, firing and modification of employment conditions, pay rates and methods of payment, the Eleventh Circuit nevertheless concluded, similar to its analysis of Factor A, above, that by deciding when, where and how long to pick a crop, economic dependence on the growers was established.[9] Again, the Eleventh Circuit sought indirect means of tracing an owner's management decisions that inherently contain market and non-labor management components into a labor-management issue that affects joint employment status.[10]

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[9] Inconsistent with this analysis in the instant case, the Eleventh Circuit's earlier *Long and Scott* decision held that while the grower's "planting decisions" (including how much to plant, which fields to harvest, frequency of harvests, and decisions regarding tilling, fertilization and irrigation) may have "indirectly" affected employment, the affect was "neither direct nor substantial." *Aimable v. Long and Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994). The Eleventh Circuit in *Long and Scott* held that control is found when the growers "go beyond general instructions . . . to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work." *Id.* None of these facts appear in the record of this case.

[10] By using the term "indirect" in both Factors A and B, DOL's revised regulation allows a court to conclude that workers are economically dependent upon a grower in every case by seeking to find a cause and effect between each grower management decision and the effect of the decision on the amount of work or income it provides a worker. Such an approach, of course, makes a joint

The Eleventh Circuit's application of Factors A and B, the only factors that can determine the outcome of these cases, will always result in a finding of joint employment. In finding economic dependence in Factors A and B where the relationship between growers and the FLC was as removed as is practically possible, the Eleventh Circuit has retroactively applied a strict liability standard in reversing the district court.

D. The Eleventh Circuit's Analysis Requires Growers to Relinquish Fundamental Rights of Farmers to Farm Labor Contractors to Avoid Joint Employer Liability.

The decision of the Eleventh Circuit would require, as a practical matter, that growers relinquish their rights as owners, such as the right to choose whether to pick certain quantities of a crop at a certain location on a given day. In almost all aspects of labor-intensive agriculture in which NCAE members participate, such decisions are based on fundamental non-labor related factors, such as the market price of a crop. In most instances, growers will not pick a crop if they will lose money in doing so.

The effect of the Eleventh Circuit decision is to set an unprecedented condition that growers must relinquish traditional ownership and marketing rights to an FLC before they can establish an independent contractor relationship. Based on the conclusion of the Eleventh Circuit in this case, failure of the grower to abdicate such rights deprives the grower of the right to maintain an independent labor contractor relationship and invariably will result in joint employment liability. In effect, it leads to a strict liability standard under the new DOL regulation. Such a result is contrary to the intent of MSPA and FLSA, where joint employment was not a foregone conclusion

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employment analysis a mere formality since it predetermines economic dependence and, thus, joint employment.

but intended to be based on a factual determination by considering the total circumstances of a case.

Ironically, while the Eleventh Circuit's decision, in essence, requires growers to turn over fundamental ownership decisions to FLC's, this is inconsistent with DOL's regulations which carefully define and describe the duties of FLC's. A "farm labor contractor" is defined by DOL's regulations under MSPA as follows:

> . . . any person—other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

29 C.F.R. § 500.20(j) (1998).

The DOL regulations then define "farm labor contracting activity" to mean "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." 29 C.F.R. § 500.20(i) (1998). The DOL regulations are very clear to identify the narrow type of labor-related activities that FLC's perform. Yet, the Eleventh Circuit's decision implicitly expanded upon that definition by requiring growers to relinquish to FLC's their ownership duties, such as choosing whether to pick certain quantities of a crop at a certain location, determining which areas of the farm to harvest, and monitoring the farm during the day.

In finding economic dependence in Factors A and B where the relationship between the growers and the FLC's was as removed as is practically possible in almost all farming operations, the Eleventh Circuit ignores the practical reality of farm management practices. The result is that in every case where joint employment is at issue, Factors A and B are predetermined to a finding of joint employment.

II. THE ELEVENTH CIRCUIT'S DECISION ADOPTING A *DE FACTO* STRICT LIABILITY INTERPRETATION OF JOINT EMPLOYMENT IS INCONSISTENT WITH THE INTENT AND LEGISLATIVE HISTORY OF MSPA.

The Eleventh Circuit's *de facto* strict liability interpretation of the Department of Labor's joint employer regulation is improper in light of the intent and legislative history of MSPA. To determine joint employment under MSPA, Congress intended that the test set forth in *Hodgson v. Griffin and Brand, Inc.*, 471 F.2d 235 (5th Cir. 1973), be controlling.[11] Migrant and Seasonal Agricultural Worker Protection Act, P.L. 97-470, 1982 U.S.C.C.A.N. (96 Stat.) 4547, 4553. Following this direction from Congress, DOL issued its original regulation to evaluate joint employment.[12] DOL's revised 1997 regulation, as applied by the Eleventh Circuit creating a strict liability standard, goes well beyond the test intended by Congress.

Further evidence that Congress did not intend to create a strict liability standard in lieu of a factually based joint employment test as originally issued by DOL is illustrated by efforts to subsequently amend MSPA to include a strict liability standard. In 1993, in the 103rd Congress, Representative George Miller (D-CA) introduced H.R. 1173 that would have amended MSPA to include a strict liability standard in lieu of the original regulatory-based joint employment determination. Under the proposal, fixed-situs employers would have been strictly liable for violations occurring on their property as a result of the

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[11] MSPA joint employer regulation is derived from the FLSA joint employment doctrine. 29 C.F.R. § 500.20(h)(5)(ii) (1998). Imposing a *de facto* strict liability joint employer standard on MSPA only, and not the FLSA, will single out agricultural employers for discriminatory treatment. *Compare* 29 C.F.R. §§ 791.1-791.2 (1998) (FLSA joint employer regulations).

[12] See footnote 3, *supra*.

acts or omissions of FLC's. Congress failed to enact that legislation.

During hearings conducted on H.R. 1173, Rep. Dooley voiced the practical concerns of NCAE members in his remarks concerning the proposal:

> I think a lot of us are very concerned about the pass-through of liability through the contractor. I think we have to be very concerned about the situation that we put a lot of private businesses in if they had to be fully responsible for the actions of a contractor which they have little oversight of. . . . [this legislation] unfairly burdens small farmers who must rely on farm contractors to provide labor on a short-term basis by making them liable for violations committed by the contractor. The bill would place these small farmers in financial jeopardy for actions beyond their control. While farm labor contractors should be held to the standard of law, it is clearly unfair to make small farmers responsible for violations committed by the contractor.

H.R. Rep. No. 103-29, at 42-44 (1993).

III. THE ELEVENTH CIRCUIT'S DECISION WILL DISCOURAGE FARM OWNERS FROM UTILIZING FARM LABOR CONTRACTORS AND WILL HAVE SERIOUS ADVERSE POLICY CONSEQUENCES ON THE AGRICULTURAL INDUSTRY IN THE UNITED STATES.

The Eleventh Circuit's decision will be detrimental to both the grower and the farm worker, both of whom benefit from the services of contractors. Growers will not enter into what have been previously independent contractor relationships, for which a joint employment determination was not predetermined, and accept strict liability for the acts or omissions of an FLC about which they had no knowledge or control. This could have a staggering impact and adverse consequences on the agricultural industry in our country and will impede the effective allocation of labor in American agriculture.

were livestock and poultry farms. Thus the potential financial exposure of growers who employ FLC's would be substantial, and would extend throughout the agricultural industry.

The Eleventh Circuit's application of the revised joint employer regulation in a manner tantamount to a strict liability standard "adds to a growing list of reasons for producers to curtail labor-intensive operations."[14] The economic consequences for the U.S. economy are substantial. This strict liability approach will only result in discouraging agricultural employers from using FLC's, thereby driving FLC's from the labor market and disrupting the agricultural labor supply.

CONCLUSION

For the foregoing reasons, the *amicus curiae* National Council of Agricultural Employers respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 22, 1999

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[14] LeRoy, *supra*, at 182.